

Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty

Judith Resnik* & Julie Chi-hye Suk**

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I. CHANGING SOVEREIGNTY AND DIGNITY

Sovereignty discussions in the United States and elsewhere have multiple dimensions.¹ One set of concerns, which we group under the term “external sovereignty,” focuses on the prerogatives of the United States vis-à-vis other nations—to participate (or not) in new legal institutions such as the International Criminal Court,² to join (or not) transnational agreements such as the Convention on the Elimination of All Forms of Discrimination Against

* Arthur Liman Professor of Law, Yale Law School. © Copyright 2003 Judith Resnik, all rights reserved. We are grateful to Denny Curtis, Joshua Civin, Oona Hathaway, Vicki Jackson, David Nachman, Gerald Neuman, Diane Orentlicher, Peter Paden, James Whitman, Jed Handelsman Shugerman, Eric Biber, and Tom Grey for helpful comments on earlier drafts and to Gene Coakley, Lara Slachta, and Sara Sternberg for ever-thoughtful and insightful assistance in research.

** J.D. Candidate, Yale Law School, 2003; D. Phil. Candidate, University of Oxford.

1. See generally STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 2-42 (1999) (delineating four uses of sovereignty—domestic, international legal, interdependence, and Westphalian—and pointing out their logical inconsistencies).

2. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999 [hereinafter Rome Statute]. See generally THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE (Roy S. Lee ed., 1999) [hereinafter THE INTERNATIONAL CRIMINAL COURT]; Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 STAN. L. REV. 1633 (2003).

Women (CEDAW),³ to use (or not) opinions of other nations' courts in the development of domestic legal norms, and to engage (or not) in dialogues through adjudication to articulate international norms.⁴ External sovereignty is about the literal and legal power of the United States in its relationship to other nations and to the world community.

The term sovereignty in the United States is also deployed in reference to relationships among governments *within* this country's borders. This "internal sovereignty" talk arises when states claim prerogatives of lawmaking free from "interference" by federal law⁵ and when Indian tribes seek release from constraints imposed by either states or the federal government.⁶ In recent years, the current majority of the United States Supreme Court has revived the language of state sovereignty—proffering it as the basis for invalidating federal legislation altogether⁷ or for concluding that federal legislation cannot endow claimants with certain rights against states.⁸ The Court's internal sovereignty

3. G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) [hereinafter *CEDAW*], discussed *infra* notes 61, 226-29 and accompanying text.

4. See Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2003) (discussing the methods by which domestic systems can incorporate or accommodate transnational law).

5. See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (addressing the Supreme Court of Virginia's asserted right to be free from federal judicial power); *Printz v. United States*, 521 U.S. 898 (1997) (concluding that federal law cannot "commandeer" state officials to implement federal legislation); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that Congress could not, without a better factual record and a more narrowly tailored remedy, impose obligations on states to pay damages for violations of certain rights of the disabled).

6. See, e.g., *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (holding that a state county could exercise zoning authority over a tribe despite its claim to sovereignty); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding tribal courts lacked power to try non-Indians).

Conceptually, discussions of tribes could, depending on one's viewpoint, be located in either discussions of internal or external sovereignty. From the vantage point of U.S. law, tribes are demi-sovereigns, which under current Supreme Court formulations only have that sovereignty accorded to them by federal law. From the vantage point of some tribes, they are fully sovereign nations, struggling for legal independence. See generally Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

7. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (holding unconstitutional the Civil Rights Remedy in the Violence Against Women Act as beyond congressional power under the Commerce Clause and the Fourteenth Amendment); *Printz*, 521 U.S. 898 (holding unconstitutional federal legislation requiring local officials to assist in background checks for gun purchases); *United States v. Lopez*, 514 U.S. 549 (1995) (holding the Gun-Free School Zones Act of 1990 to exceed congressional power under the Commerce Clause).

8. See, e.g., *Garrett*, 531 U.S. at 356 (holding that Congress could not impose monetary liability on states for violations of Title I of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that Age Discrimination in Employment Act's (ADEA) abrogation of state sovereign immunity exceeded congressional

argument is supported, in part, by characterizing states as bearers of *dignitary* interests. For example, in 2002, a majority of the Supreme Court proclaimed that “[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”⁹

This turn to dignity as a justification for or as an explanation of state power within the United States is actually a *return* to an older conception of the sovereign. Monarchs were the sovereigns to whom dignity belonged in eras when ordinary persons were not due such respect and deference.¹⁰ The personal authority and dignity of royalty prompted an elaborate code of interpersonal behavior, replete with rules dictating forms of address and limiting permissible interactions between monarchs and their subjects.¹¹ As

powers under the Fourteenth Amendment); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress lacked power under the Indian Commerce Clause to abrogate the immunity of states from lawsuits brought pursuant to the Indian Gaming Regulatory Act). See generally JOHN T. NOONAN, JR., *NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002) (analyzing and criticizing several of the recent decisions as legally and historically flawed).

As the Court has invigorated state sovereignty, it has also diminished the degree to which Indian tribes can make claims of sovereignty. Compare *Nevada v. Hicks*, 533 U.S. 353 (2001) (holding that tribal courts lacked authority to adjudicate a tribal member’s claim that state officials had wrongfully entered the Shoshone reservation to conduct a search and that they were not courts of general jurisdiction), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that tribal jurisdiction did not reach a civil dispute of members with nonmembers), with *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (recognizing tribal jurisdiction as a matter of comity and stating that alleged incompetence of tribal court is not among exceptions to exhaustion of remedies requirement), and *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (recognizing the exercise of federal jurisdiction as potentially impairing tribal court authority).

9. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (holding that sovereign immunity protected states from adjudication at a federal agency responding to a private party’s complaint of a violation of a federal statute regulating shipping); see also *Alden v. Maine*, 527 U.S. 706, 715 (1999) (commenting that “[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity”); *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 268 (1997) (stating that “the dignity and respect afforded a State, which the immunity is designed to protect, are placed in jeopardy” by private suits in federal courts, regardless of the basis of federal courts’ jurisdiction); *Seminole Tribe*, 517 U.S. at 58 (suggesting that a purpose of the Eleventh Amendment, in addition to protecting state treasuries, is to prevent states from the indignity of being subject to private suits); *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (permitting states to appeal the denial of sovereign immunity defenses to ensure “that the States’ dignitary interests can be fully vindicated”).

10. See DON HERZOG, *HAPPY SLAVES* 39-71 (1989) (examining the transformations from the 1530s to the 1690s in England and the obedience due to the monarchy, linked to the mastery of God); Michael J. Meyer, *Introduction* to *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 1, 4-5 (Michael J. Meyer & William A. Parent eds., 1992) (discussing the revolutionary challenges that the French and American commitment to rights posed to Burkean assumptions that dignity was what commoners lacked, because they had “no rank”).

11. HERZOG, *supra* note 10, at 52-57 (detailing which ranks could wear what fabrics and in whose presence hats had to be removed).

Justice Stevens has explained, "in a society where noble birth can justify preferential treatment, it might have been unseemly to allow a commoner to hale the monarch into court."¹²

Dignity took a radical turn in the centuries that followed, as it became a quintessentially personal trait of all human beings and a marker of equality. Twentieth century human rights law embodies these premises through proclamations and agreements committing governments to respecting the dignity of all people.¹³ Further, during the last several decades, collectives of marginalized persons began to assert a legal right to recognition as status-holding, self-determining nations or as collective rightsholders within either a larger or another polity.¹⁴ These groups are sovereigns of a different sort, sometimes located on land controlled by other polities asserting authority.

12. *Seminole Tribe*, 517 U.S. at 96 (Stevens, J., dissenting).

13. The Preamble to the 1948 Universal Declaration of Human Rights opens with the words: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." *Universal Declaration of Human Rights* pmbl., G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948). Its first article declares: "All human beings are born free and equal in dignity and rights." *Id.* art. I.

More specific transnational agreements have parallel provisions. *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) ("Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"); International Covenant on Civil and Political Rights, G.A. Res. 2200a (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace"); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 5 I.L.M. 352, 660 U.N.T.S. 195; ("Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms . . . without distinction of any kind, in particular as to race, colour or national origin"); *CEDAW*, *supra* note 3, pmbl. ("Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of man and woman"). *See generally* Louis Henkin, *Human Dignity and Constitutional Rights*, in *THE CONSTITUTION OF RIGHTS*, *supra* note 10, at 210, 211-12.

14. *See, e.g.*, Charter of the Assembly of First Nations pmbl. (2002) (Canada) (identifying the reaffirmation of "dignity and worth" as one of its goals and calling for "recognition and respect for their mutual sovereign equality") [hereinafter *First Nations Charter*], available at http://www.afn.ca/About%20AFN/charter_of_the_assembly_of_first.htm. *See generally* S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 45-125 (1996) (describing the development of the norms and transnational agreements and case law recognizing such rights); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995) (discussing mechanisms to ensure voice for and toleration of minorities).

The emergence during the twentieth century of dignity as a right of individuals and the rejection of prior practices of colonization and discrimination against racialized and ethnic groups impose constraints on sovereignty¹⁵ that illuminate the dynamic nature of the content of sovereignty.¹⁶ So do innovations in technology, enabling global markets, making security dependent on cooperation, and diminishing the saliency of geography.¹⁷

Some argue that such developments (or democracy itself) undermine the utility and intelligibility of sovereignty, diminished in the wake of growing economic, political, and environmental interdependencies.¹⁸ We think it useful to focus instead on sovereignty's plasticity, no longer signaling total power nor predicated only on physical boundaries but continuing to mark significant amounts of authority and status. Whatever prerogatives governments once had, they cannot—as a legal matter (see human rights law) and as a political matter (see preemptive military strikes beyond one's national borders)—treat human

15. See, e.g., ANAYA, *supra* note 14, at 129-84 (analyzing various implementing procedures for the provision of remedial and affirmative measures that recognize rights of indigenous peoples to land, social welfare programs, and self-governance); KYMLICKA, *supra* note 14, at 173-95 (arguing that national life can accommodate multiple allegiances with attention paid to equality within and among groups); AVISHAI MARGALIT, *THE DECENT SOCIETY* 173-76, 180-86 (Naomi Goldblum trans., 1996) (discussing the presence of subgroups within a polity with their own forms of life and the obligations of "a decent society" not to denigrate them, and to encompass groups with "competing and not merely incompatible forms of life").

16. For example, the Draft Declaration claims forms of sovereignty that can be layered or interwoven with other holders of power. See, e.g., *Draft Declaration on the Rights of Indigenous Peoples* art. 4, U.N. ESCOR, 46th Sess., U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994) ("Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.").

17. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 13-33 (1995) (arguing the interdependency of sovereigns); JEAN-MARIE GUÉHENNO, *THE END OF THE NATION-STATE* 45-65 (Victoria Elliott trans., 1995) (arguing the importance of both local and global conditions and the declining capacity of the nation to respond to economic and environmental changes); SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 1-30 (1995) (focusing on the effect of global markets and arguing that they denationalize certain forms of power); Helen Stacy, *Relational Sovereignty*, 55 *STAN. L. REV.* 2029 (2003) (discussing the necessity of sovereignty to be responsive to changing material, technological, and economic conditions).

18. See, e.g., Andrej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 *SUP. CT. REV.* 341 (arguing that sovereignty had no meaning as a legal concept); see also HERZOG, *supra* note 10, at 77-80 (offering the phrase "masterless men" to underscore how social ordering changed with the rise of consent theory); *id.* at 215-47 (affirming yet questioning theories of consent). A somewhat different argument is that formal attributes associated with sovereignty—such as territorial rights, recognition, control, and autonomy—are regularly compromised by nations claiming to be sovereign. See KRASNER, *supra* note 1, at 237.

beings with utter disregard and assert sovereignty as an absolute defense to their actions. The rise of dignity (*inter alia*) has changed the meaning of sovereignty.

Given the nesting of dignity in personhood, the Supreme Court's insistence on attributing dignity to states is seen by some as either obnoxious or disingenuous. Objections arise from the anthropomorphism in general,¹⁹ and more specifically, from the association of this particular attribute with the state.²⁰ One argument runs that, even if certain aspects of personality can properly be associated with governmental entities, dignity is not the kind of attribute states ought—as a philosophical, a political, or a legal matter—to claim. Another is that the use of the term dignity in such contexts has no real analytic purchase and deserves no attention in its own right.

We think that the turn to dignity in sovereignty discussions ought neither to be dismissed nor embraced without puzzling about its deployment as the twenty-first century begins. In this Article, we explore the role that the term dignity plays in U.S. constitutional law. Specifically, we have scanned 200 years of decisionmaking by the United States Supreme Court to learn when, where, and why the word has been used. That excavation in turn yields several insights.

First, the word dignity was not used in reference to personal constitutional rights in the Supreme Court's jurisprudence until the 1940s in the wake of World War II,²¹ when legal and political commentary around the world turned to the term dignity to identify rights of personhood. In such correlation, we identify causation. Without citation or reference to "foreign" sources, the Supreme Court has, since World War II and the Universal Declaration of Human Rights, embedded the term dignity into the U.S. Constitution.²² As we explain below, dignity talk in the law of the United States is an example of how U.S. law is influenced by the norms of other nations, by transnational experiences, and by international legal documents.

Second, we argue that the Supreme Court's reinvigoration of doctrines of internal sovereignty by endowing states with dignity is driven in part by anxiety occasioned by the very permeability of our legal system. Repeatedly during the twentieth century, those focused on shoring up the external sovereignty of the United States have relied on claims that the internal sovereignty of this federation requires that the United States limit its involvement with

19. See Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 84-85 (2001) (rejecting attributions of feeling but arguing that dignitary concerns have an important role in underscoring states' expressive interests in being understood as empowered to govern).

20. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 76, 96-98 (1996) (Stevens, J., dissenting) (arguing that the Declaration of Independence and subsequent democratic developments rejected the concept of an unaccountable and unquestionable sovereign).

21. See *infra* notes 73-74 and accompanying text.

22. See *infra* notes 75-87 and accompanying text.

transnational legal and political activities.²³ Both the permeation of U.S. law by international norms and the efforts to ward it off give rise to our third conclusion: Given global activity and technology, U.S. law (and life within this country) cannot be secured against external forces. Rather, this country's law is inevitably in conversation (directly or indirectly) with legal developments around the world.²⁴

Fourth, we believe that as a legal matter, dignity ought not to be reserved exclusively to individuals. Through an analysis of the "caselaw of dignity," we have found many examples of the utility of institutional dignity, enabling a fledgling organization—be it a court or a nation—to function.²⁵ This form of dignity, akin to the Chayesian concept of sovereignty,²⁶ entails the idea of an individual or an entity having the capacity to function, to be able (as an instrumental matter) to accomplish something in the world. For clarity, we speak of the dignity accorded to nonhumans as *role-dignity*, by which we mean that respect is accorded to an entity in order to enable that entity to produce something of value to persons or groups. In contrast, the dignity of people can have instrumental utility but is not justified solely in reference to what other goods it produces but rather as something that inheres in personhood.²⁷

Fifth, and finally, as we will elaborate,²⁸ legal recognition of institutional role dignity ought to have a narrower ambit than legal recognition of individual dignity. To endorse an entity's claim to role-dignity requires a contextual evaluation of the purposes for which the dignity claim is made and an assessment of the relative power of the entity claiming this attribute. Specifically, because of revised understandings of the import of human dignity,

23. See *infra* notes 221-30 and accompanying text.

24. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (discussing transnational legal processes); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001) [hereinafter Resnik, *Categorical Federalism*] (discussing transnational developments of women's rights and their effects on United States's lawmaking); Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.-Oct. 1997, at 183 (describing the disaggregation of state processes and the role of both governmental and nongovernmental networks); see also Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary and Congressional Power*, 78 IND. L.J. 223 (2003) (discussing the Supreme Court's refusal to permit federal courts to have the remedial capacity now common in many countries to enjoin the transfer of assets pending the outcome of a damages action).

25. See *infra* notes 110-32 and accompanying text.

26. See CHAYES & CHAYES, *supra* note 17.

27. See MARGALIT, *supra* note 15, at 67-68; Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, in ZUR AUTONOMIE DES INDIVIDUUMS, 249, 250-51 (Dieter Sion & Manfred Weiss eds., 2000); see also Alan Gewirth, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS, *supra* note 10, at 10, 11-14 (distinguishing different conceptions of dignity, one recognizing the capacity of a person to make claims against other persons and a second inherent form, priceless and antecedent to rights). These three commentators all rely on Kant for an understanding of persons treated as ends, not as means.

28. See *infra* Part III.D.

law ought not to rely on institutional role-dignity to permit an entity to avoid accounting for its behavior towards individuals. Because “[s]overeignty, in the end, is status,”²⁹ requiring sovereigns to account for actions through orderly dialogue between individuals, entities, and governments ought not be understood to be an insult to status. Rather than being conceived to be insulting or humiliating, the very practice of adjudication should be seen as a form of recognition of the status of democratic sovereigns, committed to renewing their authority through processes of communication and mutual consent.

Our approach eliminates a claim of role-dignity as a justification for sovereign immunity. Taken further, it could also be used to abolish sovereign immunity to the extent it exempts sovereigns from explaining their conduct. This approach comports empirically with the increasing willingness of democratic governments (including states within the United States, the federal government and other nations within their own boundaries and in transnational legal institutions) to submit to legal processes.³⁰

Our argument does not, however, require sovereigns to provide remedies for all forms of misbehavior or to appear at all times and places to respond. Accommodations to respect institutional role-dignity and to facilitate governance may be crafted, for example, by courts limiting the kinds of remedies to be imposed or by shaping special formats for adjudication of disputes involving states. Further, we recognize that the endurance of states within the United States and of nation states around the world is not a happenstance of terrain. Rather, it is an artifact of constitutional text, institutional interaction, and political practice.

Thus, our approach does not ignore the needs of states to shore up institutional role-dignity. Other means—legal and political—enable states within federations and nations to obtain and to retain authority. Examples in U.S. law include the “equal footing doctrine” of states and limitations on federal deployment of state actors through anticommandeering principles. Other federations use different mechanisms, evidencing the ability of legal systems to devise (and disagree about) mechanisms that enable authority.

What legal systems ought not to do is to identify as an insult or injury the fact that a government has an obligation to explain its action to citizens or to other governments. Democratic commitments to human dignity require sovereigns to account in appropriate times and places for their behavior. That accounting is in fact an aspect of the role-dignity of such governments for it marks the fact of their authority and their power to affect humans—often times generatively but sometimes harmfully.

29. CHAYES & CHAYES, *supra* note 17, at 27.

30. See *infra* text accompanying notes 184-91.

II. THE IDEA, THE POLITICS, AND THE DEVELOPING LAW OF DIGNITY

Before turning to the law of dignity, we need to locate the concept. A quick and overly simplified summary of a rich idea identifies many aspects. Dignity accrues to individuals through their awareness of their status in their own eyes and in the eyes of others.³¹ Further, dignity represents a symbolic status distinct from a person's material well-being. Dignity underscores the equal worth of all persons. Moreover, dignity is used in reference to humans' capacity to make decisions about their own lives.³² Dignity also engenders a set of practices, linked to a person's bounded being. Because of a person's dignity, other individuals and the state cannot treat a person in ways deemed to intrude on physical and mental spaces reserved to the individual. Indeed, the state cannot touch a person in certain ways.

But questions remain. Is dignity an independent attribute of personhood, or is dignity a part of personhood related to, derived from, and/or a part of autonomy, liberty, and equality? Is dignity transnational and ahistorical or is it culture-dependent? Does the meaning of what constitutes an affront to dignity have a gendered content?

These questions signal the lively debate about the boundaries of dignity itself. Some claim for dignity a categorical valence, pronouncing the worth, value, esteem, and deference owed to all human beings³³ and, it is occasionally argued, also to animals.³⁴ Some relate dignity to religious commitments about the sanctity of humans,³⁵ while others locate dignity in human agreement or conflict, as an artifact of interaction rather than as a predicate to it.³⁶ For some, individual dignity is a social undertaking, stemming from recognition of a

31. See generally Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM AND "THE POLITICS OF RECOGNITION"* 25 (Amy Gutmann ed., 1992).

32. *Id.* at 30-40; see also MARGALIT, *supra* note 15, at 51-68.

33. See, e.g., Gewirth, *supra* note 27, at 12-28; Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848 (1983).

34. See STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (2000); Steven M. Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 793 (1998). In contrast, others argue that human respect for animals stems from obligations of humanity. See Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1527 (2001) (book review) (citing an argument, based on Kantian approaches, that "animals have worth and dignity only as instruments of human life and that we become cruel ourselves when we treat animals cruelly").

35. See Michael J. Perry, *Is the Idea of Human Rights Ineliminably Religious?*, in *LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES* 205 (Thomas Kearns & Austan Sarat eds., 1996); Dierk Ullrich, *Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany*, 3 GLOBAL JURIST FRONTIERS at pt. II.B (2003) (discussing the Christian theological origins of the link between dignity and humanity), available at <http://www.bepress.com/gj/frontiers/vol3/iss1/art1>.

36. Jeffrey C. Isaac, *A New Guarantee on Earth: Hannah Arendt on Human Dignity and the Politics of Human Rights*, 90 AM. POL. SCI. REV. 61 (1996).

person's identity and an acknowledgment of an individual's connection to others as a part of a community.³⁷

Whether it is dignity or the expressions of dignity that vary by culture is also contested, with some critics arguing that liberal Western democracies have erred in assuming that a particular version of dignity (often linked to autonomy) is universal.³⁸ That discussion suggests that claims for dignity can be deployed for political purposes—for example, that liberalism's use of dignity (as well as a cluster of related individual rights) is a mechanism for expanding ideologies associated with particular nations.³⁹

Whether dignity has a gender is another question. A stress on dignity as "self-control," predicated on claims to autonomy,⁴⁰ ascribes to dignity characteristics of individuality at odds with certain feminist arguments that persons are situated and interrelational actors,⁴¹ deriving strength and dignity from their ability to imbue themselves and others with the capacity to flourish.⁴² Moreover, what constitutes a dignitary harm is plainly altered when injuries to women are in focus.⁴³ For example, in 1977, through additions to the Geneva Conventions, international humanitarian law prohibited "outrages upon personal dignity, in particular humiliating and degrading treatment,

37. See Herbert C. Kelman, *The Conditions, Criteria, and Dialectics of Human Dignity*, 21 INT'L STUD. Q. 529 (1977).

38. See Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 AM. POL. SCI. REV. 303 (1982); Rhoda E. Howard & Jack Donnelly, *Human Dignity, Human Rights, and Political Regimes*, 80 AM. POL. SCI. REV. 801 (1986).

39. Although not focused on dignity per se, Michael Doyle's discussion of Kantian claims in foreign affairs offers a ready example. See Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, in DEBATING THE DEMOCRATIC PEACE 3, 3-56 (Michael E. Brown, Sean M. Lynn-Jones & Steven E. Miller eds., 1996).

40. See Michael J. Meyer, *Dignity, Rights, and Self-Control*, 99 ETHICS 520 (1989).

41. See JODI DEAN, *THE SOLIDARITY OF STRANGERS* (1996); FEMINISTS READ HABERMAS (Johanna Meehan ed., 1995); MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000); SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989).

42. See JOAN TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993); Patricia Hill Collins, *Shifting the Center: Race, Class, and Feminist Theorizing About Motherhood*, in REPRESENTATIONS OF MOTHERHOOD 56 (Donna Bassin, Margaret Honey & Meryle Mahrer Kaplan eds., 1994); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 12 (2000); Kimberly Springer, *Third Wave Black Feminism?*, 27 SIGNS 1059 (2002).

43. Analyses are provided in Kristen Campbell, *Legal Memories: Sexual Assault, Memory, and International Humanitarian Law*, 28 SIGNS 149 (2002); Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in Time of War*, in WOMEN'S RIGHTS, HUMAN RIGHTS 198 (Julie Peters & Andrea Wolper eds., 1995); Dorean M. Koenig & Kelly D. Askin, *International Criminal Law and the International Criminal Court Statute: Crimes Against Women*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 3 (Dorean M. Koenig & Kelly D. Askin eds., 2000).

enforced prostitution and any form of indecent assault.”⁴⁴ More recently, the Rome Statute setting forth the jurisdiction of the International Criminal Court included “rape, sexual slavery, enforced prosecution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” in its detailing of “crimes against humanity.”⁴⁵ Such positive enactments reflect feminist efforts to gain recognition of injuries to dignity specially suffered by women.⁴⁶

Turning to dignity’s relationship to legal rights, to sovereignty, and to political theory, dignity is sometimes understood as a source of rights, a predicate condition to exercising other rights, and/or an artifact of rights.⁴⁷ Nations are sometimes argued to be the mechanism for protecting human dignity,⁴⁸ and other times seen as the principal threat to dignity.⁴⁹ As a political-legal claim, dignity in Western nations was once an attribute reserved for the nobility but became (with the help of Rousseau,⁵⁰ Thomas Paine,⁵¹ and many others) available to citizens. Liberation theories of various kinds—including the centrally important work in prior centuries of the antislavery and women’s rights movements⁵²—both pressed for an understanding of dignity as an aspect of personhood and for a more inclusive definition of citizenship.

44. See Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Conventions, art. 75(2)(b), U.N. GAOR, 32d Sess., Annexes I & 2, U.N. Doc. A/32/144, 16 I.L.M. 1391 (1977).

45. Rome Statute, *supra* note 2, art. 7.

46. See Cate Steins, *Gender Issues*, reprinted in INTERNATIONAL CRIMINAL COURT, *supra* note 2, at 357, 357.

47. See, e.g., Gewirth, *supra* note 27; Isaac, *supra* note 36, Michael S. Pritchard, *Human Dignity and Justice*, 82 ETHICS 299 (1972).

48. See Louis Henkin, *The Universal Declaration and the U.S. Constitution*, 31 POL. SCI. & POL. 512, 512 (1998) (“Strictly, there are no ‘international human rights’ The purpose of international concern with human rights is to make national rights effective under national laws and through national institutions.”).

49. See Isaac, *supra* note 36, at 70; Kelman, *supra* note 37, at 536-40.

50. JEAN-JACQUES ROUSSEAU, *Discourse on the Origin and Foundations of Inequality Among Men*, in THE DISCOURSES AND OTHER EARLY POLITICAL WRITINGS 111, 166 (Victor Gourevitch ed. & trans., Cambridge Univ. Press 1997) (1766); JEAN-JACQUES ROUSSEAU, *Of the Social Contract*, in THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 39 (Victor Gourevitch ed. & trans., Cambridge Univ. Press 1997) (1762); see also Taylor, *supra* note 31, at 44-51 (discussing Rousseau’s views of equal dignity).

51. See Meyer, *supra* note 10, at 5-7 (describing an understanding in the eighteenth century that dignity was rank but how Paine’s commitment to the “natural dignity of man” and the American Enlightenment helped to shift the meaning of the term).

52. See generally DAVID BRION DAVIS, *SLAVERY AND HUMAN PROGRESS* (1984); KAREN OFFEN, *EUROPEAN FEMINISMS, 1700-1950: A POLITICAL HISTORY* (2000); LEILA J. RUPP, *WORLDS OF WOMEN: THE MAKING OF AN INTERNATIONAL WOMEN’S MOVEMENT* (1997); JOAN WALLACH SCOTT, *ONLY PARADOXES TO OFFER: FRENCH FEMINISTS AND THE RIGHTS OF MAN* (1966).

Coupled with the revolutionary ideology of popular sovereignty,⁵³ these projects succeeded in expanding the categories of persons understood as having dignity, although some have argued that legal expressions of civility and dignity remain grounded in cultures of hierarchy.⁵⁴

Dignity as a matter of law is associated with the second half of the twentieth century. In the face of the horrors of World War II and of other forms of totalitarian governments, legal documents increasingly incorporated express guarantees of dignity for persons. The Basic Law of Germany—adopted in 1949—begins with the words: “The dignity of man is inviolable. To respect and protect it is the duty of all state authority.”⁵⁵ The Constitution of Puerto Rico, written in the early 1950s, states that “[t]he dignity of the human being is inviolable,”⁵⁶ as does the Constitution of Montana.⁵⁷ In 1992, Israel adopted the Basic Law on Human Dignity and Liberty;⁵⁸ section 2 declares, “There shall be no violation of the life, body or dignity of any person as such,”⁵⁹ and section 4 entitles all persons to the protection of “their life, body and dignity.”⁶⁰ Many international covenants incorporate the term as well. For example, CEDAW explains that “the charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women.”⁶¹

As these phrases from many legal documents illustrate, the law of dignity defines it as an attribute of all persons, not only those who claim loyalties to a specific nation. Thus dignity becomes a transportable aspect of personhood,

53. See generally EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988).

54. See, e.g., James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1284-85 (2000) (arguing that protection of dignity in Germany and France derives not only from post-World War II concerns for human rights but also from those countries' aristocratic cultures of earlier centuries); James Q. Whitman, *On Nazi "Honour" and the New European "Dignity,"* in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 243 (Christian Joerges & Navraj Ghaleigh eds., 2003) (arguing that as a sociological matter, the German fascist legal regime's interest in honor has influenced the European commitment to dignity).

55. GRUNDGESETZ [GG] [Constitution] art. 1 (F.R.G.).

56. P.R. CONST. art. II, § 1. See generally Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: Global/Local/National?*, 63 MONT. L. REV. (forthcoming 2003).

57. MONT. CONST. art. II, § 4. According to Jackson, the Constitution was drafted in the 1970s, and both the Puerto Rican and German constitutions were sources for this phrase. The Louisiana Constitution of 1974 has a textual header that refers to a “Right to Individual Dignity,” LA. CONST. § 3, but does not refer to dignity in the text. Jackson, *supra* note 56 (manuscript at 7-10 & n.20, on file with authors).

58. BASIC LAW: HUMAN DIGNITY AND LIBERTY § 1(a) (Isr.).

59. *Id.* § 2.

60. *Id.* § 4; see Izhak England, *Human Dignity: From Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1903 (2000).

61. See CEDAW, *supra* note 3, pmbl.

responsive to the practical and political import of globalization.⁶² The law of dignity dovetails with a range of political theories of the changing relations between states and their citizenry and the obligations of political actors more generally. For functioning democracies, all participants must partake in conversation, accounting for their actions and views in order to legitimate them.⁶³

Of course, while many countries and transnational accords use the same term, the nuances and valence in different languages, let alone legal systems, are important sources of difference.⁶⁴ On the other hand, as more constitutional democracies join together in transnational agreements using the term and exchange views on dignity by issuing opinions examining how the deployment and meaning of the term differs or overlaps, a shared understanding can develop of what the term dignity entails.

III. BRINGING THE TERM DIGNITY INTO UNITED STATES SUPREME COURT LAW

We turn now to the jurisprudence of the United States Supreme Court. With search engines enabled by computers, we have been able to learn when and where the term dignity has been used. The word “dignity” can be found—through databased searches—some 900 times in Supreme Court decisions since 1789. According to the Supreme Court, individuals,⁶⁵ nations,⁶⁶ states,⁶⁷ legal

62. See T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 147-50 (2002) (discussing degrees of relatedness to more than one place, entity, tribe, and nation, and suggesting the term “denizens” to denote the wider range of persons to whom governments may owe particular obligations). Additional analyses of the interaction between globalization and conceptions of the nation state are provided in T. Alexander Aleinikoff, *Between Principles and Politics: U.S. Citizenship Policy*, in FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD 119, 162-68 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000); Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447 (2000); Kim Rubenstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalized World*, 7 IND. J. GLOBAL LEGAL STUD. 519 (2000); and Peter J. Spiro, *The Impossibility of Citizenship*, 101 MICH. L. REV. (forthcoming 2003) [hereinafter Spiro, *Impossibility of Citizenship*]; Peter J. Spiro, *Political Rights and Dual Nationality*, in RIGHTS AND DUTIES OF DUAL NATIONALS 135 (David A. Martin & Kay Hailbronner eds., 2003).

63. Commitments to such dialogic relationships are central to several theorists. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); SEYLA BENHABIB, *SITUATING THE SELF* 68-120 (1992); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 287-329 (William Rehg trans., 1996); JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy trans., 1984).

64. See Ullrich, *supra* note 35, pt. II.D-E (arguing the complexity of human dignity in the law of both countries, its abstract nature resulting in differences in opinions in many cases, but also its influence), available at <http://www.bepress.com/gj/frontiers/vol3/iss1/art1>.

65. See *infra* notes 120-22 and accompanying text.

66. See *infra* notes 73-87 and accompanying text.

67. See *supra* note 9 and accompanying text.

institutions,⁶⁸ personages such as judges,⁶⁹ the flag,⁷⁰ and even God⁷¹ have dignity interests.

But over the course of Supreme Court elaboration, the focus has shifted from institutions to persons. During the eighteenth and nineteenth centuries, the Supreme Court mentioned the word “dignity” only in terms of entities such as sovereigns and courts. Moving forward to the twentieth century (when about two thirds of the Court’s decisions that use the term “dignity” were written), the word becomes linked to persons. It was not until the 1940s—the decade of World War II and the Universal Declaration of Human Rights—that the Court embraced dignity as something possessed by individuals. Since then, the Court has embedded the term dignity in interpretations of the U.S. Constitution.

A. *Dignity and the Bill of Rights*

As Gerald Neuman has detailed, the concept of dignity can be found throughout the history of American constitutional law.⁷² In contrast, the word itself became a part of the vocabulary of constitutional rights only during the last sixty years. In 1942, Felix Frankfurter used the term “dignity” to describe the purposes of the Bill of Rights.⁷³ The following year (1943), writing for the

68. *See infra* note 114.

69. *See infra* note 115.

70. *See Halter v. Nebraska*, 205 U.S. 34, 41 (1907) (upholding a state statute protecting the American flag from being used in advertising and noting that “insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot”); *cf. Texas v. Johnson*, 491 U.S. 397, 420 (1989) (upholding the First Amendment right to burn a flag while acknowledging the dignity accorded to symbols of the country, such as the custom of saluting the flag and according the burnt flag a respectful burial).

71. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 525 (1952) (upholding the First Amendment right to distribute films deemed “sacrilegious” but acknowledging that such films may include blasphemy, defined as “indignity” to God).

72. Neuman, *supra* note 27, at 251-52.

73. At issue was whether federal felony defendants had a Sixth Amendment right to counsel, which the majority recognized. In a dissenting opinion, Justice Frankfurter argued against a blanket rule: “The guarantees of the Bill of Rights are not abstractions. Whether their safeguards of liberty and dignity have been infringed in a particular case depends upon the particular circumstances.” *Glasser v. United States*, 315 U.S. 60, 89 (1942) (Frankfurter, J., dissenting).

The first usage of the phrase “human dignity” comes in 1946. *See* Neuman, *supra* note 27, at 256 (citing *In re Yamashita*, 327 U.S. 1 (1946)); *see also* Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 *How. L.J.* 145, 150-53 (1984).

Reviews of literature from the legal academy also provide evidence of the effects of fascism on political and legal discourse. *See, e.g.,* RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 182 (1999) (focusing on the influence of Hannah Arendt on the turn in American political and legal theory to “human dignity”); Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 *YALE L.J.* 423, 429

Court, Justice Frankfurter explained the rationale for the requirement that arrested persons be promptly taken before a committing authority. As he explained, “[a] democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process.”⁷⁴

Since the 1940s, we find dignity mentioned in relation to the Eighth Amendment prohibition on cruel and unusual punishment; the Fourth Amendment protection against unlawful searches and seizures; the Fourteenth and Fifteenth Amendment rights to be free from discrimination, and the Ninth and Fourteenth Amendment rights to make one’s own decisions on procreation.

For example, the concept of dignity as a personal attribute of humans has become central to elaborating the meaning of the Eighth Amendment. As Chief Justice Warren explained in 1958 in *Trop v. Dulles*,⁷⁵ “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”⁷⁶ Concern about dignity became central in the 1970s to Justice Brennan’s analysis in *Furman v. Georgia*⁷⁷ that, in certain circumstances, imposing the death penalty violated the Eighth and Fourteenth Amendments. “A punishment is ‘cruel and unusual’ . . . if it does not comport with human dignity. . . . The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings.”⁷⁸ Valuing dignity has also supported elaboration of the understanding of another form of an Eighth Amendment violation—the failure to respect the personhood of prisoners either by ignoring their known medical needs⁷⁹ or by placing them in conditions of confinement that are degrading.⁸⁰

(1996) (finding that during the 1930s, *The Yale Law Journal* published no articles on natural law and universal rights, whereas after World War II, such articles appeared regularly); see also Karl N. Llewellyn, *The Law, Human Dignity, and Human Civilization, from Science, Philosophy, and Religion*, 3D SYMPOSIUM 297 (1943), reprinted in KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (1962).

74. *McNabb v. United States*, 318 U.S. 332, 343 (1943).

75. 356 U.S. 86 (1958).

76. *Id.* at 100. At issue in *Trop v. Dulles* was the constitutionality of a statute providing for loss of citizenship by reason of conviction and dishonorable discharge for desertion during war. The Court held that to render a person stateless, thereby stripping “the citizen of his status in the national and international political community” was “offensive to cardinal principles for which the Constitution stands.” *Id.* at 101-02.

77. 408 U.S. 238 (1972).

78. *Id.* at 270 (Brennan, J., concurring); see also Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in *THE CONSTITUTION OF RIGHTS*, *supra* note 10, at 145, 145-77.

79. See *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976) (holding that in light of the Eighth Amendment concerns that embody “broad and idealistic concepts of dignity, civilized standards, humanity, and decency,” the deliberate withholding of medical treatment from an inmate known to be in need violates the Constitution).

80. Conditions of confinement cases focus on decent treatment of prisoners, and the Court has several times held that depriving inmates of a “minimal civilized measure of life’s necessities” violates the Eighth Amendment. See *Wilson v. Seiter*, 501 U.S. 294, 306, 308 (1991) (White, J., concurring, joined by Marshall, Blackmun & Stevens, JJ.) (citing *Hutto v.*

Human dignity is likewise a feature of twentieth century Fourth Amendment jurisprudence. The idea that searches of persons by state officials are assaultive to human dignity can be found in case law before World War II, when efforts to enforce Prohibition prompted concerns about subjecting persons to indignities.⁸¹ In the 1940s, Justice Jackson, dissenting, used the language of dignity to explain a Fourth Amendment interest in the privacy of the home.⁸² In 1966, in *Schmerber v. California*, the Court pronounced that the “overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State,”⁸³ and in 1969 that approach animated a majority decision invalidating a search.⁸⁴

In addition, over the past decades, the harms of discrimination came to be couched in the language of dignity. For example, in *Heart of Atlanta Motel v. United States*, which upheld the Civil Rights Act of 1964 as a legitimate exercise of Congress’s power under the Commerce Clause, Justice Goldberg’s concurring opinion characterized racial discrimination by public establishments as a “deprivation of personal dignity.”⁸⁵ More recently, the Court described

Finney, 437 U.S. 678 (1978), and *Rhodes v. Chapman*, 452 U.S. 337 (1981)). The term “dignity” is sometimes used directly. See *Hope v. Pelzer*, 536 U.S. 730, 745 (2002) (describing the handcuffing of an inmate to an outdoor hitching post for several hours and that he was made to stand in the hot sun as “antithetical to human dignity”); see also *Walker v. State*, 2003 MT 134, 2003 Mont. LEXIS 206 at *40 (holding that the placement of a mentally ill prisoner in an isolation cell without a working toilet violated Montana’s constitutional protection of the “innate dignity of human beings”).

81. See *Carroll v. United States*, 267 U.S. 132, 153-54 (1925) (holding that it would be “intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search”). This approach can be found in more recent case law as well. See *Bond v. United States*, 529 U.S. 334, 337 (2000) (holding that the physical manipulation of a passenger’s carry-on baggage amounted to an illegal search, and recognizing the indignity of physically invasive inspections); *Terry v. Ohio*, 392 U.S. 1, 16-17 (1968) (stating that a “careful [tactile] exploration of the outer surfaces of a person’s clothing all over his or her body” is a “serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly”).

82. *Harris v. United States*, 331 U.S. 145, 198 (1947) (Jackson, J., dissenting) (objecting to a general warrant authorizing a search and arguing for oversight by a disinterested magistrate of the scope and propriety of searches and that such a limitation was “not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self respect”).

83. 384 U.S. 757, 767 (1966) (holding, however, that the concern about dignity did not preclude the coercive taking of blood of a criminal defendant accused of driving while intoxicated); see also *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (discussing the differing “degree of intrusiveness upon personal privacy and indeed even upon personal dignity” of searches depending on where one is).

84. *Chimel v. California*, 395 U.S. 752 (1969) (holding that a warrantless search of a criminal burglary defendant’s entire house was unreasonable, violating the Fourth Amendment).

85. 379 U.S. 241, 291 (1965) (Goldberg, J., concurring) (noting that it was borrowing the phrase from the Senate Commerce Committee’s report on the bill); see also *Korematsu*

discriminatory stereotyping of women as denigrating an individual's "dignity."⁸⁶ Similarly, Fourteenth Amendment rights to make decisions about reproduction have been described in terms of dignity: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."⁸⁷

As this catalogue suggests, as a theoretical matter, the term dignity is doing different kinds of work. In some contexts, such as the abortion and discrimination cases, dignity is invoked in relationship to personal autonomy.⁸⁸ Understood through the lens of the Fourth and the Eighth Amendments, dignity stands for the inviolability of persons from intrusions by the state. Because the term dignity is usually deployed in conjunction with claims of individual rights to privacy, autonomy, liberty, and equality under the First, Fourth, Fourteenth, and Fifteenth Amendments, some might argue that dignity itself has no independent content. Rather (and here akin to arguments that privacy is not a distinct concept but derives from and is a form of autonomy⁸⁹), the argument

v. United States, 323 U.S. 214, 240 (1945) (Murphy, J., dissenting) (objecting to the Court's upholding of an order prohibiting persons of Japanese ancestry from leaving specified areas and commenting that such reliance on a person's ancestry was adopting "one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow"). See generally Bernard R. Boxill, *Dignity, Slavery, and the Thirteenth Amendment*, in THE CONSTITUTION OF RIGHTS, *supra* note 10, at 102-17.

86. J.E.B. v. Alabama *ex rel* T.B., 511 U.S. 127, 142 (1994) (holding that peremptory strikes of potential jurors based on their sex violated the Equal Protection Clause); see also Rice v. Cayetano, 528 U.S. 495, 517 (2000) (holding that a Hawaiian state statute requiring Hawaiian ancestry to vote in elections for trustees of the Office of Hawaiian Affairs violated the Fifteenth Amendment and explaining that the constitutional violation "demean[ed] a person's dignity and worth" by judging the person "by ancestry instead of by his or her own merit and essential qualities," which was inconsistent with the "respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens").

Discrimination has also been understood to impose "indignities." See, e.g., Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 532 (1979) (identifying segregation and forcing black students to sit in the back of the room as "indignities"); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 446 (1968) (upholding under the Thirteenth Amendment a statute prohibiting discrimination in the sale of property and acknowledging the indignity and violence to which Negroes were subjected during slavery).

87. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

88. See generally Suzanne Baer, *Dignity or Equality?*, in SEXUAL HARASSMENT (Catharine A. MacKinnon & Reva B. Siegel eds., forthcoming 2003); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1 (1999); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

89. See ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY (1988) (arguing that privacy ought to be understood as comprehending a discrete normative concern about control over access to one's person). For discussion of the degree to which privacy constitutes an analytically distinct norm, see RUTH GAVISON, PRIVACY AND THE LIMITS OF LAW 421 (1980); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45

would be that, were dignity not a part of the vocabulary, little would be lost. Alternatively, one might argue that the many uses of dignity demand elaboration of the varied content, making plain that a single term does not suffice.

We share the concern about vagueness. But the turn to dignity in U.S. constitutional law represents an effort in legal doctrine to capture an added dimension of harm that a particular event threatens.⁹⁰ Dignity as a legal premise underscores that the physical and mental boundaries of a person are entitled to some recognition atop prohibitions against assault and coercion. In this sense, dignity can sometimes be understood in instrumental terms, as a means of highlighting the depth of another form of harm. But in other instances, personal interests in dignity have a distinct place, constraining governmental actions, even when potentially useful.⁹¹ To underscore the idea of dignity as a distinct form of legal injury, we used the phrase “adding insult to injury” in the title of this Article.

Moreover, as this brief survey evidences, in U.S. law, the constitutional properties of personhood denoted by dignity were not so labeled until the 1940s.⁹² Many of the concepts entailed were a part of our constitutional jurisprudence before then.⁹³ But the term was not. Why did the language shift? The words changed as many persons (both outside the United States and within) used the language of dignity to decry the harms inflicted by Nazi Germany and Stalinism. The Universal Declaration of Human Rights centered its proclamation on that word, and lawmakers in many countries followed suit.

This history of the deployment of the word should alter contemporary discussions of the role that law from outside the United States plays in this country’s jurisprudence. Today, some advocates press for lawmakers in the

STAN. L. REV. 1 (1992); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989).

90. Evidence for dignity as denoting an additional legal injury comes not only through public law cases but in the instances when the Supreme Court is discussing torts, and in the private law context, addressing the “indignities” that persons had suffered. See, e.g., *Phila., Wilmington & Balt. R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 214 (1858) (justifying the imposition of punitive damages in a libel action on the grounds that “simple compensation” was insufficient, given that the “injury complained of has been inflicted maliciously or wantonly, and with circumstances of . . . indignity”).

91. See R. Kent Greenawalt, *The Right to Silence and Human Dignity*, in THE CONSTITUTION OF RIGHTS, *supra* note 10, at 192-209 (discussing limitations on interrogation); Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 44-46 (2002) (discussing human dignity’s concern for a person as an end, not as a means).

92. As noted, some case law had addressed tortious injuries as imposing indignities. See, e.g., *Beckwith v. Bean*, 98 U.S. 266, 275 (1878) (justifying jury discretion over punitive damages for libel to consider “the degree of indignity involved in the wrong done”); *Quigley*, 62 U.S. (21 How.) at 214 (characterizing the malicious infliction of injury as occurring “with circumstances of contumely or indignity”); see also *supra* note 81; *infra* note 110.

93. Neuman, *supra* note 27, at 251-52.

United States to take account of rights of personhood as elaborated in the constitutional law of other countries and in transnational jurisprudence. A case in point is capital punishment and, specifically, imposition of the death penalty on the mentally retarded and on juveniles. For example, in *Atkins v. Virginia*,⁹⁴ the European Union and several U.S. diplomats filed amici briefs arguing that executing the mentally ill violated transnational understandings of human rights⁹⁵ and interfered with American diplomatic efforts to reduce human rights abuses.⁹⁶ In the *Atkins* decision, the debate about using non-U.S. law was noted only by way of a comment in a footnote that the “national consensus” against execution of the mentally ill comported with views of the “world community.”⁹⁷ In contrast, both the dissent by the Chief Justice (joined by Justices Scalia and Thomas) and the dissent by Justice Scalia (joined by the Chief Justice and Justice Thomas) objected to the mention of views of other countries.⁹⁸ As Justice Scalia put it, “thankfully,” the views of other nations were not “always those of our people,” and the views of other nations, “however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”⁹⁹

We disagree. The norms of the United States are not immune from outside influences. Our review of the deployment of the term dignity of persons in the constitutional law of the United States demonstrates that use of the word began during World War II and expanded as the term was embraced in the 1948 Universal Declaration of Human Rights and in other nations’ constitutive legal documents. We are not, of course, alone in understanding these effects. Louis Henkin,¹⁰⁰ Gerald Neuman,¹⁰¹ Harold Koh,¹⁰² and others have explored the influence of international law in the United States for many years.

94. 536 U.S. 304 (2002).

95. Brief of Amicus Curiae the European Union, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727), *reintroduced in Atkins* (No. 00-8452).

96. Brief of Amici Curiae Diplomats, *McCarver* (No. 00-8727), *reintroduced in Atkins* (No. 00-8452).

97. *Atkins*, 536 U.S. at 316 n.21 (citing the Brief of the Amicus Curiae the European Union, *McCarver* (No. 00-8727)).

98. *Id.* at 324-25, 328 (Rehnquist, C.J., dissenting) (arguing that he failed to see “how the views of other countries regarding the punishment of their citizens” was relevant to the decision and that “international opinion” was not a “well-established objective indicator” of contemporary values); *id.* at 347 (Scalia, J., dissenting) (arguing that views of “members of the so-called ‘world community’” were not relevant).

99. *Id.* at 347-48 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting)).

100. See Henkin, *supra* note 48, at 512 (arguing the influence of the U.S. Constitution on the Declaration).

101. Neuman, *supra* note 27.

102. Harold Hongju Koh, *Bringing International Law Home*, 35 Hous. L. Rev. 623 (1998); Koh, *supra* note 24; Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181 (1996); see also MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998) (discussing more

Moreover, the influences plainly go in both directions. Constitutional law of the United States has a profound effect on developments in other legal systems.¹⁰³ Despite important differences in legal culture, jurists and lawyers nonetheless share what Pierre Bourdieu has termed a "juridical field,"¹⁰⁴ with a special language, routes of communication, and modes of discourse. The concerns about dignity that we now can see so plainly in the U.S. Bill of Rights helped to shape conceptions for many countries and the international community of the obligation of states to respect the dignity of persons.¹⁰⁵

We are not arguing that U.S. law would be the same were the Constitution to name that value explicitly or were the United States Supreme Court to embrace openly non-U.S. sources and to engage in a frank dialogue on their effect on national norm development and application.¹⁰⁶ As Aharon Barak, current President of Israel's Supreme Court recently explained, when "human dignity is expressly mentioned in a constitution," it is given independent force.¹⁰⁷ Further, the import of this country's contemporary jurisprudence on developments in other nations would be different were the United States welcoming of transnational exchanges. As Claire L'Heureux-Dubé has argued, by refusing to be involved through decisions referencing other countries' constitutional interpretation of parallel concepts, American courts limit their

generally the interactive effects of advocacy groups, motivated by value commitments and relying on information exchange to mobilize constituencies and affect policy debates).

103. Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 18-20 (1998) (discussing the influence of law of the United States on Canadian law).

104. See Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 814-21, 828-37 (1987). That essay analyzed distinctions between continental and Anglo-American traditions, which are substantial, whereas here we are arguing for overlapping work and increasing discursive interactions generating a common "judicial space" that permits distinctions by situating jurists within distinct legal systems but also has permeability across differing juridical cultures. For analyses of distinct ideas of lawyers, clients, and judges in French law, see JOHN LEUBSDORF, *MAN IN HIS ORIGINAL DIGNITY: LEGAL ETHICS IN FRANCE* (2001).

105. Henkin, *supra* note 48; L'Heureux-Dubé, *supra* note 103; Neuman, *supra* note 27. See generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

106. See Neuman, *supra* note 27 (describing an array of different kinds of engagement with nondomestic legal rules). A strategic and normative question emerges about the desirability of one legal system acknowledging the debt owed to other legal systems as contrasted with silently incorporating their rulings. See generally Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (discussing the utility of vague rules that fail to specify certain explanations).

107. Barak, *supra* note 91, at 45; see also Ullrich, *supra* note 35, pts. IV, V (comparing the differences between the development of German law, with an express textual commitment to dignity, and Canadian law, lacking such textual basis).

own role in transnational legal jurisprudence.¹⁰⁸ What we are arguing is that, despite the lack of citations to the constitutions, case law, or views of other nations, the United States Supreme Court is unavoidably affected by transnational political and legal norms, and so affected, the Court has changed the content of U.S. constitutional law to name dignity as a distinct and core value.¹⁰⁹

B. *Dignity and the Functional Capacity of Institutions*

A second aspect of our empirical quest was to understand the law of dignity in Supreme Court jurisprudence as it relates to institutions. When doing this work (and not so bedazzled by word searches as to ignore the ideas entailed), we considered the deployment of both the terms dignity and indignity. We learned that throughout its history, the United States Supreme Court has ascribed the harms of indignities to institutions (as well as to individuals¹¹⁰) and insisted on the dignity of entities, often linking that dignity to order, peace, security, and authority.

For example, the first usage we located of the word “indignity” came in 1821, in a case about whether the House of Representatives had the power to impose contempt on a member who failed to appear.¹¹¹ The Court held that the House had contempt power over its members, for otherwise it would be left “exposed to every indignity.”¹¹² Were members able to come and go as they pleased, the House could not fulfill its obligation to govern. Case law also repeatedly referred to “the dignity of debts,” asserting both the legitimacy of the obligation to pay and the power of courts to enforce the law.¹¹³ Similarly,

108. See L’Heureux-Dubé, *supra* note 103, at 24-31 (discussing dialogic exchanges among constitutional courts in other countries and the declining influence of American law as the Rehnquist Court declines to participate).

109. In Molière’s terms, we have been “speaking prose” all along. MOLIÈRE, *LE BOURGEOIS GENTILHOMME* 37 (M. Levi ed., 1917) (“Par my foi, il y a plus de quarante ans que je dis de la prose sans que je’n susse rien.”) (roughly translated as, “My goodness, I’ve been talking prose for over forty years and never knew it.”).

110. See, e.g., *Rowe v. United States*, 164 U.S. 546, 554-55 (1896) (reversing a conviction of a Cherokee for the murder of a white man by finding that jury instructions were inadequate to explain that the deceased had subjected the Cherokee to “the indignity of a personal insult” and thus had provided the “first real provocation”).

111. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

112. *Id.* at 233.

113. See, e.g., *M’Knight v. Craig’s Adm’r*, 10 U.S. (6 Cranch) 183, 186 (1810); *Harrison v. Sterry*, 9 U.S. (5 Cranch) 289, 299 (1809); *Alexandria v. Patten*, 8 U.S. (4 Cranch) 317, 320 (1808); *United States v. Fischer*, 6 U.S. (2 Cranch) 358, 397 (1805). For example, in *United States v. Fisher*, the Court raised the concern that “[t]his claim of priority on the part of the United States will, it has been said, interfere with the right of the state sovereignties respecting the dignity of debts.” *Id.* at 396-97. The question of payment of debts also sparked debate about state immunity from that form of suit. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); *Hans v. Louisiana*, 134 U.S. 1 (1890), discussed *infra* notes 142-61.

Supreme Court jurisprudence has emphasized the dignity of courts,¹¹⁴ of judges,¹¹⁵ and of judgments.¹¹⁶

In the case law, a repeated association is made between dignity and civic order. We found the phrase "peace and dignity" some 120 times, mostly before 1945. One example is the 1816 case of *United States v. Palmer*,¹¹⁷ holding that federal circuit courts had criminal jurisdiction over piracy because robbery on the high seas violated the "peace and dignity of the United States."¹¹⁸ Similarly, the dual sovereignty exception to double jeopardy (permitting both the United States and states to pursue the same defendant for the same offence) has been justified on role-dignity grounds. As the Court has explained, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'"¹¹⁹

Dignity is also linked to national security in a handful of early cases that address the interaction of nations.¹²⁰ For example, in the 1822 case of *The*

114. See, e.g., *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) (discussing the question of the order in which courts ought to decide objections to their jurisdiction based on personal and subject matter jurisdiction by referring to the "dignity of state courts"); *Pounders v. Watson*, 521 U.S. 982, 988 (1997) (upholding the power to punish contempt summarily when necessary to vindicate "the court's dignity and authority") (quoting *Cooke v. United States*, 267 U.S. 517, 534 (1925)). *Cooke*, a decision by Chief Justice Taft, explained the importance of the power of judges to "act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court, when occurring in open court" as a means of preserving the "order in the courtroom for the proper conduct of business." 267 U.S. at 534.

115. See, e.g., *United States v. Will*, 449 U.S. 200, 219 (1980) (discussing disqualification requirements and judicial independence, and explaining that English legislation in the eighteenth century, protecting judicial salaries, was "designed 'to maintain both the dignity and independence of the judges'" (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *267)); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 39 (1866) (debating the jurisdiction of military tribunals, of congressional authority in times of war, and referring to the "dignity and independence of the judges").

116. See, e.g., *Tate v. Norton*, 94 U.S. 746, 750-51 (1876) (stating that according to Arkansas law, a claim allowed by the Probate Court has the "dignity and effect of a judgment").

117. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818).

118. *Id.* at 612; see also *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (describing a "supposed violation of the peace and dignity of the sovereign power").

119. *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (citing *United States v. Lanza*, 260 U.S. 377, 382 (1922)).

120. Of eight cases mentioning security and dignity, the first four, all decided in the early 1800s, referred to the security and dignity of nations. In the twentieth century, the phrase was sometimes used in connection with an individual's interest in inviolability. For example, in *Miranda v. Arizona*, 384 U.S. 436, 479 (1966), the Supreme Court, relying in part on "decency, security, and liberty," *id.* at 479, held that the Fifth Amendment privilege against self-incrimination required that certain warnings be given to the accused. In contrast, Justice White's dissenting opinion invoked the "security and dignity" of potential crime

Santissima Trinidad, the Court relied on the security and dignity interests of the United States to uphold its right to remain neutral.¹²¹ This approach builds on a historically common usage of dignity in international law to underscore the inviolability of nation states.¹²² Countries, as sovereign within their territorial borders, relied on a cluster of claims mingling sovereignty, autonomy, and dignity to exercise power over those within and to choose who, outside their boundaries, could enter.

When the Court attributed dignity to this variety of legal entities and personages (nations, courts, judges, legislatures, offices, judgments, processes), it did so to enable their institutional functions and authority. Legitimacy was contested, and “dignity” did the work of shoring up the institution to provide it with the capacity to do its work.

Through reading this case law, we identified the concept of role-dignity, based on functional needs inhering in a role. The House of Representatives cannot govern without its members’ participation. Criminal acts can be cast in the terms of an assault on a sovereign’s dignity, undermining its ability to maintain law and order. Courts cannot control proceedings without the authority to limit participants’ speech. Debts will not be paid unless the obligation to do so is respected. Nations cannot determine how to protect their security if they cannot decide whether or not to be neutral. Dignity serves an instrumental aim, enabling an entity to accomplish specific goals.

Should we find it distasteful to talk about dignity in these institutional settings? An easy answer might be that, given the rise in the twentieth century of an understanding of dignity as essential to persons, it is best protected by reserving it exclusively for persons. But that approach fails to appreciate another set of twentieth century concerns, about harms suffered collectively by peoples when they are not recognized as having the status or the power to determine their own futures.

Indigenous peoples, such as the First Nations in Canada and Indian Tribes in the United States, have demanded recognition through collective rights to sovereignty. Dignity has become an important feature of the vocabulary of those claims for political recognition. For example, the Draft Declaration on the Rights of Indigenous Peoples begins by “affirming that indigenous peoples are equal in dignity and rights to all other peoples.”¹²³ These interests are

victims, as he worried that the new rule would interfere with apprehension of criminals. *Id.* at 540 (White, J., dissenting).

121. 20 U.S. (7 Wheat.) 283, 351-52 (1822) (“Whilst a neutral yields to other nations the unobstructed exercise of their sovereign or belligerent rights, her own dignity and security require of her the vindication of her own neutrality, and of her sovereign right to remain the peaceable and impartial spectator of the war.”).

122. See generally Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1033 (2002); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003).

123. *Draft Declaration on the Rights of Indigenous Peoples*, *supra* note 16, pmb1.

predicated on arguments for recognition, contrasted with historical experiences of indignities suffered because of group membership.¹²⁴ As article 2 of the Draft Declaration on Indigenous Rights explains: "Indigenous individuals and peoples . . . have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity."¹²⁵

The development of a norm of collective rights to dignity and equality among people of various races and cultures is ongoing.¹²⁶ Its fruition requires recognition of such collectives, previously ignored as political and cultural communities. The resort to the language of role-dignity serves to make a claim for marginalized groups akin to that made for individuals. Because such groups have suffered distinct injuries to their status and because they desire to be understood as bearers of identity and as players in international relations, the language of role-dignity has utility.¹²⁷ Not only is the failure to recognize them harmful to their pursuit of a collective identity but their collective identity protects the personal dignity of individual members and gives voice to shared aspirations.¹²⁸

One parochial example helps to underscore the continuing value of institutional role-dignity. The power of Indian tribes in the United States is contested, and a good many decisions address the question of whether federal courts ought to intervene to divest tribal courts of jurisdiction over nontribal members.¹²⁹ Similarly, many decisions address federal power to divest state

124. The *Draft Declaration on the Rights of Indigenous Peoples* makes specific reference to the past injuries imposed. Its preamble states the premise that "indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests" *Id.*

125. *Id.* art. 2. The Charter of the Assembly of First Nations in Canada also identifies one of its goals as "[t]o reaffirm our faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of our First Nations large and small." First Nations Charter, *supra* note 14, pmbl.

126. See ANAYA, *supra* note 14, at 97-104.

127. For example, article 1 of the Charter of the Assembly of First Nations in Canada asserts the power of recognition of the First Nations. It states: "By virtue of the recognition and affirmation of their mutual freedom and self-determination, First Nations possess the knowledge and political will to respect the sovereignty of each First Nation." First Nations Charter, *supra* note 14, art. 1.

128. Here, Margalit's focus on "humiliation" and his terminology of an "encompassing group" are illuminating. MARGALIT, *supra* note 15, at 137-41. Margalit identifies aspects of groups that form a mutually recognized, connected identity, and explains how "[r]idicule, hatred, oppression, or discrimination" can give rise to "hurt, humiliation, degradation, moral abasement, and insult." *Id.* at 140. On the other hand, groups may use their collective identity to argue that their actions cannot be called into question. See *infra* text accompanying note 201.

129. See, e.g., *Nevada v. Hicks*, 533 U.S. 353 (2001) (holding that tribal courts lacked power to adjudicate a civil claim brought by a tribal member against a nontribal state official who had allegedly wrongfully entered the home of the tribal member); *Oliphant v.*

courts of jurisdiction. What terms should that discourse take? Each system could speak of the other in terms that acknowledge the role of the other, even as one may have the power to trump the other. When federal courts decide whether or not to intervene or to review state court proceedings, the discussions are typically respectful of the state court proceedings, even when disagreeing with and altering outcomes.¹³⁰ In contrast, some federal court discussions of tribal courts are less solicitous of the other system's role-dignity. For example, when one U.S. federal district court refused to cede jurisdiction to a tribal court, the judge described the tribal court's proceeding as a "kangaroo" court.¹³¹

Return to the early Supreme Court case law on the dignity of institutions to remember what now may seem hard to imagine: The United States was a fledgling newcomer, marginal vis-à-vis countries such as England (from which it rebelled) and vis-à-vis states, such as New York (which predated its existence). As *The Federalist No. 30* worried:

How is it possible that a government half supplied and always necessitous, can fulfil the purposes of its institution—can provide for the security of—advance the prosperity—or support the reputation of the commonwealth? How can it ever possess either energy or stability, dignity or credit, confidence at home or respectability abroad?¹³²

Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that tribal courts lacked power to try non-Indians).

130. For discussion of the desirability of deference, see *Younger v. Harris*, 401 U.S. 37, 43-48 (1971) (prohibiting federal courts, absent exceptional circumstances, from intervening in pending state criminal proceedings). For an example of a federal court declining to cede jurisdiction, see *Steffel v. Thompson*, 415 U.S. 462 (1974) (permitting federal courts to entertain a request for declaratory relief despite the possibility that the plaintiff might soon become a criminal defendant in state court proceedings).

131. *Little Horn State Bank v. Crow Tribal Court*, 690 F. Supp. 919, 923 (D. Mont. 1988).

132. THE FEDERALIST NO. 30 (Alexander Hamilton) (addressing in general the need for sources of revenue for the federal government and arguing "that there must be interwoven in the frame of the government, a general power of taxation in one shape or another").

In general, *The Federalist* papers do not use the language of dignity very often, but when they do, the reference is to that of institutions. See, e.g., THE FEDERALIST NO. 6, at 28, 35 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (referring to the "extreme depression to which our national dignity and credit have sunk"); THE FEDERALIST NO. 46, at 315, 318 (James Madison) (Jacob E. Cooke ed., 1961) (arguing that state legislatures had not been broad in their concerns and "if they do not sufficiently enlarge their policy to embrace the collective welfare of their particular State, how can it be imaged, that they will make the aggregate prosperity of the Union, and the dignity and respectability of its government, the objects of their affections and consultations?"); THE FEDERALIST NO. 58, at 391, 395 (James Madison) (Jacob E. Cooke ed., 1961) (discussing the "house of representatives" and arguing that "[t]hose who represent the dignity of their country in the eyes of other nations, will be particularly sensible to every prospect of public danger").

Turning to the dignity of officialdom, we found a reference to the dignity of the office of the Presidency. See THE FEDERALIST NO. 69, at 463, 468 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (describing the plan to authorize the President to receive "Ambassadors and other public Ministers . . . [as] more a matter of dignity than of authority"). Another mention of dignity comes in the context of courts. See THE FEDERALIST NO. 78, at 521, 530

Reliance then on the language of role-dignity was an effort to invent the nation's authority to enforce boundaries, pursue debtors, and protect law and order, just as First Nations and indigenous peoples today turn to the concept of dignity to claim political capital. Role-dignity can be appropriately invoked in such contexts, as institutions hope to gain recognition of their powers.

C. *Role-Dignity and Immunity from Suit*

How does immunity from litigation fit within the understanding of role-dignity that we have developed? Immunity from suit excuses a potential defendant from having to account for its actions and precludes an adjudicator from reaching the merits of a claim. As a legal concept, immunity is distinct from liability and remedies.¹³³ For example, a court could find that a sovereign is not immune from suit but nevertheless conclude that, because of the fact of sovereignty, no liability attaches or certain forms of remedies (punitive damages for example) are not appropriate to award.¹³⁴ The common law of immunity (developed in this country for judges,¹³⁵ prosecutors,¹³⁶ Presidents,¹³⁷ and other executive officials¹³⁸) is justified by the need for a

(Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing against a short term of office for judges because "it would have a tendency to throw the administration of justice into hands less able, and less well qualified to conduct it with utility and dignity"). Further, in support of the need for a Supreme Court with specified jurisdiction, Hamilton argued that "[i]n cases in which a state might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal." THE FEDERALIST NO. 81, at 541, 549 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Only in the opening pages did we find an instance—in *The Federalist No. 1*—in which the word dignity is used in reference to persons. Publius argued to "the people of the State of New York" to adopt the Constitution, for it was "in your interest to adopt [the Constitution.] I am convinced that this is the safest course for your liberty, your dignity, and your happiness." THE FEDERALIST NO. 1, at 3, 6 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

133. For example, in *Davis v. Passman*, the Court held that the plaintiff had stated a cause of action, implied from the Fifth Amendment of the Constitution, against a congressman who had allegedly discriminated against her because she was a woman, but that a separate question, not resolved, was his immunity from suit under the Speech or Debate Clause of the Constitution. 442 U.S. 228, 236 (1979).

134. See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258-71 (1981) (holding, as a matter of statutory interpretation, that punitive damages could not be obtained from a city for a violation of § 1983).

135. *Stump v. Sparkman*, 435 U.S. 349 (1978) (holding a judge immune from a suit challenging his decision to enter an ex parte order of sterilization of a fifteen year old girl).

136. *Imbler v. Pachtman*, 424 U.S. 409 (1976) (holding that prosecutors could not be sued for damages for putting on testimony they knew to be untrue).

137. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (precluding damage actions against the President for actions taken while in office).

138. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (both explaining the concept of official immunity, focused on whether a government

defendant, holding a particular role, to accomplish that job free from fear of subsequent litigation that (goes the theory) would chill the defendant in the performance of public duties.¹³⁹ Common law immunities for private parties, such as clergy, have a similar basis, whereas common law immunities for family members are usually described as protecting a certain form of relationship from state oversight.¹⁴⁰

Defendant states (as a matter of internal sovereignty) and defendant nations (as a matter of external sovereignty) have argued their immunity from suit. Sometimes, that immunity claim is couched in the language of dignity.¹⁴¹ On several occasions, the United States Supreme Court has addressed the relevance of dignity to an exemption for sovereigns from responding to the merits of lawsuits. An early and famous iteration, in 1793, is *Chisholm v. Georgia*,¹⁴² which permitted Georgia to be sued in assumpsit by a resident of South Carolina seeking to recoup debts owed. That decision was the first occasion upon which the Court considered whether states could be sued by private parties. Most of the Justices, writing separately, rejected the notion that states' dignitary interests barred such suits seeking repayment of money.¹⁴³

For Chief Justice Jay¹⁴⁴ and for Justice Wilson,¹⁴⁵ the question of sovereignty and dignity prompted consideration of the status relationships within the new Republic. With the backdrop of a parliamentary monarchy, the Chief Justice detailed the differences between "feudal sovereignties and Governments founded on compacts."¹⁴⁶ In a feudal system, "Princes have personal powers, dignities, and pre-eminences,"¹⁴⁷ whereas in this compact, rulers acted as officials but, apart from those duties, had no special status vis-à-

official knew or should have known that actions would deprive a person of his or her federally protected rights).

139. See generally Peter H. Schuck, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983).

140. See, e.g., Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996) (addressing the immunity from suit of husbands who beat their wives).

141. See *infra* notes 166-78. The early references have historical grounding. As Meyer explains, the term dignity was often used to refer to the status of eminent persons or to the state. Meyer, *supra* note 10, at 6 (citing references in *The Federalist* papers to the dignity of the state). Further, as both Lee and Smith detail, international relations focused on the dignity and autonomy of nations. Lee, *supra* note 122, at 1034; Smith, *supra* note 122.

142. 2 U.S. (2 Dall.) 419 (1793).

143. Justice Iredell, writing a dissenting opinion, acknowledged that the question was one of first impression. His opinion focused on the first Judiciary Act's jurisdictional grant, which he argued should be interpreted in light of the common law. Finding no rights of actions against Kings and focused on the need to shield state treasuries, he concluded that the lawsuit could not go forth. *Id.* at 429-50.

144. *Id.* at 469.

145. *Id.* at 453.

146. *Id.* at 472.

147. *Id.*

vis private citizens.¹⁴⁸ Given the “equal footing” of all,¹⁴⁹ the concept of dignity had no bearing, for its content implied the very rank hierarchies that the United States had rejected.¹⁵⁰ Justice Wilson also rejected the idea that state sovereignty enabled states to assert dignity as a basis for immunity from suit. For him, dignity remained salient as well, but it was the dignity of the “majesty of the people.”¹⁵¹ As he explained the hierarchy, a “state, useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance.”¹⁵²

In his opinion, Justice Blair relied on the U.S. Constitution as the “only fountain from which . . . [to] draw.”¹⁵³ Justice Blair described the wording of Article III (with its statement of federal jurisdiction encompassing suits “between a State and Citizens of another State”¹⁵⁴) as reflecting the “dignity of a State” by naming states first in that listing.¹⁵⁵ But, given the express constitutional provision for jurisdiction over cases brought by states and that, once in litigation, a judgment could run against either a plaintiff or a defendant, Justice Blair concluded that a lawsuit in federal court against a state did not undermine respect for states.¹⁵⁶

As is familiar, *Chisholm*’s holding was overturned by the enactment of the Eleventh Amendment, whose text precludes federal courts from exercising at least some forms of jurisdiction over a lawsuit filed by a citizen of one state against another state.¹⁵⁷ Immunity law has been the subject of sustained historical investigation and debate, with disagreements about both English practices and state and federal decisions permitting remedies against government. Some argue that protection of states from suits was not understood until recently to be an artifact of constitutional law and that forms of redress against states and their officials were available.¹⁵⁸ Others claim a historical pedigree for constitutional immunity.¹⁵⁹ By the end of the nineteenth

148. *Id.*

149. *Id.* at 471.

150. *Id.* at 471-73.

151. *Id.* at 463.

152. *Id.* at 455.

153. *Id.* at 450.

154. *Id.* In its list of kinds of cases or controversies over which federal courts have jurisdiction, Article III also includes disputes “between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.” U.S. CONST. art. III, § 2.

155. *Chisholm*, 2 U.S. (2 Dall.) at 450-51.

156. *Id.* at 452-53.

157. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

158. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 126-63 (1984) (Brennan, J., dissenting); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

159. See, e.g., *Pennhurst*, 465 U.S. at 101-21 (Powell, J.).

century, the Supreme Court concluded in *Hans v. Louisiana*¹⁶⁰ that states could not be sued in federal court by their own citizens (in addition to out-of-state litigants). Again questions remained about whether *Hans* was a constitutional or common law decision.¹⁶¹

Depending on the interpretation of the Eleventh Amendment to which one subscribes, what has been precluded—either by the Eleventh Amendment, the Tenth, the constitutional structure and history, or the common law—varies. For some, all the Eleventh Amendment did as a matter of constitutional law was to prohibit federal courts from exercising jurisdiction based on diversity, but federal courts could entertain lawsuits against states if predicated on a federal question.¹⁶² This approach understands the original 1789 Constitution as subjecting states to suit through its creation of federal power in Article I and elsewhere.¹⁶³ Within this framework, federal judges may, as a jurisprudential matter, decline to award certain forms of remedies against states. Immunity becomes a common law abstention doctrine, subject to congressional override.¹⁶⁴ For others, the Eleventh Amendment constitutionalizes a broader immunity from suit for states.¹⁶⁵ For yet others, the Eleventh Amendment restores states' preexisting and constitutional immunity, limited only when Congress acts pursuant to post-Civil War amendments, and/or specifically through the Fourteenth Amendment, and when doing so, has a sufficient record upon which to proceed and shapes a remedy proportionate to the problems of state misconduct.¹⁶⁶

Returning to the nineteenth century, one of the decisions of the Supreme Court—*In re Ayers*¹⁶⁷—had relied on the language of dignity. There, the Court stated:

160. 134 U.S. 1 (1890).

161. See Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988). The ambiguous text of *Hans* includes the sentence: "The suability of a state, without its consent, was a thing unknown to the law." 134 U.S. at 16.

162. *Seminole Tribe v. Florida*, 517 U.S. 44, 82-83 (1996) (Stevens, J. dissenting); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 5 (1989) (Brennan, J., announcing the judgment of the Court, joined by Marshall, Blackmun & Stevens, JJ.).

163. See Justice Brennan's decision in *Union Gas*, 491 U.S. 1.

164. See Jackson, *supra* note 161, at 84-86 (arguing sovereign immunity as a federal common law doctrine of abstention and comity rather than a constitutional requirement).

165. See, e.g., *Seminole Tribe*, 517 U.S. at 54.

166. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365-70 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81-82 (2000); *Alden v. Maine*, 527 U.S. 706, 756 (1999). See generally Evan H. Caminker, "Appropriate" Means-End Constraints on Section 5 Powers, 53 STAN. L. REV. 1127 (2001).

167. 123 U.S. 443, 505 (1887). Rufus Ayers, the Attorney General of Virginia, was involved in a complex dispute about whether Virginia coupons, purchased in London's markets, could be used to pay taxes. *In re Ayers* also exemplifies another aspect of immunity law—when a lawsuit can be brought against government officials as contrasted to the state itself. See, e.g., *Ex parte Young*, 209 U.S. 123 (1908) (permitting an injunction

The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer to complaints of private persons¹⁶⁸

The Court continued that the purpose of a "constitutional exemption" required that the Eleventh Amendment be construed "not literally and too narrowly, but fairly, and with such breadth and largeness . . . to accomplish" its purpose. The goal was not to subject states "in the administration of their public affairs" to judicial oversight.¹⁶⁹ Here, the distinction between immunity and remedy comes back into play, for judges could decline to "interfere" with states' public affairs or decisions without exempting states from explaining the basis for decisions made.

For much of the twentieth century, the debate about state immunity did not focus on the concept of dignity.¹⁷⁰ Rather, over decades during which the law generally moved toward expanding the remedial obligations of governments, the struggle was about what forms of remedies (damages, injunctions, declaratory relief, described as prospective or retrospective, and whether and how to draw such lines¹⁷¹) against which officials or entities¹⁷² were appropriate.¹⁷³ But, under the current majority's approach to lawsuits against states, dignity has returned as a source of an expanding understanding of states' sovereign immunity.¹⁷⁴ As others have also noted, the invocation of dignity, framed in part by the 1887 discussion in *Ayers* (which has been invoked repeatedly¹⁷⁵) requires exploration.¹⁷⁶

action against a government official alleged to be depriving the litigants of constitutionally protected rights).

168. *Ayres*, 123 U.S. at 505.

169. *Id.* at 505-06.

170. See Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1011-1038 (2000).

171. See *Edelman v. Jordon*, 415 U.S. 651 (1974).

172. See, e.g., *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997).

173. See generally Vicki C. Jackson, *Coeur d'Alene, Federal Courts and the Supremacy of Federal Law: The Competing Paradigms of Chief Justices Marshall and Rehnquist*, 15 CONST. COMMENT. 301 (1998); Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259 (2001).

174. See Vicki C. Jackson, *Seductions of Coherence: State Sovereign Immunity and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691 (2000) (discussing the expansion of immunity doctrines and arguing that they are predicated on a misguided view of federalism); Jackson, *supra* note 161.

175. See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); *Alden v. Maine*, 527 U.S. 706, 748 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 97 (1996).

What is the nature of the affront? Why does “subjecting a state to the coercive process of judicial tribunals at the instance of private parties” constitute an “indignity”?¹⁷⁷ The current majority has argued that dignity “inher[es]” in the status of being sovereign,¹⁷⁸ and that while states lacked the “full authority of sovereignty,” they retained the “dignity . . . of sovereignty.”¹⁷⁹ When we place this claim within our context of role-dignity and test it to learn how immunizing a state from accounting for its actions enables it to function, we find it wanting.

First, even when this nation was new, members of the Supreme Court saw the problem of elevating a state’s interest in dignity over individual rights, which, in that era, focused on rights to protect property.¹⁸⁰ Second, when federal judges did bow to state interests, judges did so sometimes out of fear that state defendants would not comply with court mandates and, moreover, that the executive would not use its political capital to enforce those orders.¹⁸¹ In this sense, the dignity at stake was that of the judges.¹⁸² In contrast, when the United States brought suit against states, the authority of the executive existed to augment the power of judges.

Today, however, the federation of the United States is firmly in place, in part through a Civil War, constitutional amendments, and disputes in which federal enforcement powers triumphed. Noncompliance with court orders remains a problem in litigation (with failures by parents to pay child support

176. See Caminker, *supra* note 19, at 83-84 (arguing that the turn to dignity ought not to be dismissed without exploration of its import); Meltzer, *supra* note 170, at 1038-41 (same).

177. *In re Ayers*, 123 U.S. 443, 505 (1887).

178. *Alden*, 527 U.S. at 714.

179. *Id.* at 715. Evan Caminker expanded on this approach by distinguishing an anthropomorphism to which he objected from a state’s “expressive” interest in being understood as authoritative. Finding such concern legitimate, Caminker ultimately rejected it as a basis for immunity. See Caminker, *supra* note 19, at 85-86 (describing state expressive interests in protecting their dignity as a means of affirming “the fundamental structural commitments embedded in our constitutional system of governance matters for its own sake, not as a means to achieving some other end”).

180. See *supra* notes 142-56.

181. See Gibbons, *supra* note 158, at 1998 (suggesting that the *In re Ayers* decision was influenced in part by Virginia’s “resistance to the payment of the debts”); John V. Orth, *History and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 1147, 1155 (2000) (discussing challenges to the authority of judges).

182. See Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. (forthcoming 2003). Jackson identified judges’ concerns about their own independence as a factor in the United States’s immunity from suit. Because Article I, Section 8 gives Congress the power to pay the debts of the United States, and Section 9 prohibits the drawing of money from the Treasury without appropriations by law, courts lack the power to cut checks. If judges award money judgments against the United States, they become dependent on Congress and the Executive to pay funds. Immunity of the federal government avoids revealing that dependence as well as potential conflicts.

orders as an oft-cited example¹⁸³), but the judiciary has less reason to fear rebellion from state officials and more reason to expect support for its judgments from the executive branch.

Third, and illustrative of this transformation, twentieth century statutory law is replete with enactments undermining the view that immunity from suit is necessary to protect either state or federal governments from losing the ability to accomplish their jobs. At the national level, Congress has repeatedly waived its own immunity from suit. The Federal Torts Claims Act,¹⁸⁴ the Administrative Procedure Act,¹⁸⁵ and the Court of Federal Claims itself are all tributes to a federal sovereign understanding its obligation to account to its citizens for its actions.¹⁸⁶ At the state level, as Professor Lauren Robel has documented, states have likewise waived immunity from suit in their own courts.¹⁸⁷ Further, attorneys general from several states have declined in their own state courts to assert federal immunities available under United States Supreme Court decisions.¹⁸⁸ Additional evidence of the lack of a relationship between immunity from suit and the power to govern comes from the fact that under U.S. law, municipalities and local governments do not enjoy that protection. Yet they remain important venues of lawmaking.

Moreover, through both adjudication and legislation, U.S. law has also limited the immunity from suit of foreign governments in this country's courts. The enactment of the Foreign Sovereign Immunities Act in the 1970s¹⁸⁹ required foreign governments to respond to certain kinds of claims, while immunizing them from others.¹⁹⁰ Turning to trends in other countries,

183. Federal legal responses to that problem include the 1992 Deadbeat Dad legislation, as amended and renamed the Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (codified as amended at 18 U.S.C. § 228).

184. 28 U.S.C. § 1346 (2003).

185. 5 U.S.C. §§ 551-559, 701-706 (2003).

186. See Judith Resnik, *Of Courts, Agencies, and Outliving One's Own Anomalous Character*, 71 GEO. WASH. L. REV. (forthcoming 2003).

187. Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L. J. 543 (2003).

188. *Id.* (describing interviews and case law). That evidence undercuts the wisdom of the Court's majority "speaking for" and assuming state interests of this sort. See Judith Resnik & Joshua Civil, *When States Disagree* (Jan. 2003) (unpublished manuscript on file with authors) (analyzing some 25 recent instances in which states have appeared on both sides of cases before the Supreme Court, including *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), holding states immune from suits under the Americans with Disabilities Act).

189. Pub. L. No. 94-583 (1975) (codified as amended at 28 U.S.C. §§ 1330, 1332, 1441, 1602-1622).

190. The Foreign Sovereign Immunities Act (FSIA) provides that a foreign sovereign cannot be held liable for alleged misbehavior undertaken as a sovereign. See *Saudi Arabia v. Nelson*, 507 U.S. 349, 370 (1993). However, the FSIA has several exceptions, including permitting suits for actions based upon commercial activities carried on in the United States by foreign states or for acts performed in the United States in connection with offshore commercial activities of the foreign state elsewhere if those acts cause direct effects in the

the United States lags behind many democracies that provide broader means for citizens to obtain redress from their governments.¹⁹¹

Fourth, twentieth century political theory also undercuts the propriety of linking dignity with immunity. Dignity is inevitably about status, and once “degrading hierarchies” gave way to equality in constitutional law,¹⁹² status relations had to be revised. Litigation is itself a useful way to express the changes that have occurred. By transforming persons and institutions into “plaintiffs” and “defendants,” litigation confers some degree of equivalency, for, as Justice Blair explained long ago, whether bringing or defending litigation, one can win or lose.¹⁹³ But, as Evan Caminker has explained, the recent sovereign immunity jurisprudence can be understood as the Court’s expression of the message that “states have the dignified status of coequal sovereigns” with each other and with the federal government,¹⁹⁴ but not with human beings.

In light of twentieth century legal commitments to human dignity that entail reconceiving sovereignty, ranking the dignity of states above that of

United States. See 28 U.S.C.A. § 1605(a)(2) (West 2003). “Commercial activity” has been interpreted to refer to actions by foreign states that resemble those of a private profit-making player rather than a regulator of the market. *Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). As to when a sovereign is in fact the defendant and how to assess the relationships of foreign sovereigns to commercially owned enterprises, see *Dole Food Co. v. Patrickson*, 123 S. Ct. 1655 (2003).

From the vantage point of the current majority of the Supreme Court, committed to the immunity of states from suit, this legislation, representative of the “modern trend” toward abrogation, is not relevant, because “the constitutional doctrine [of immunity] is meant to be both immutable by Congress and resistant to trends.” *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 n.4 (1999). Of course, the difficulty with that claim is not only the various interpretative options on the constitutional attitude toward states’ immunity but also the current legal rules, simultaneously insisting on the jurisdictional prohibition while permitting Congress, under certain circumstances, to abrogate and states to waive it. See James E. Pfander, *Waiver of Sovereign Immunity in the “Plan of the Convention,”* 1 GEO. J.L. & PUB. POL. 13 (2003) (criticizing the selective waiver theory); Christina Bohannon, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273 (2002) (arguing the many means by which states can waive immunity that ought to enable, under current law, subjecting states to suit).

191. See James E. Pfander, *Government Accountability in Europe: A Comparative Assessment*, 35 GEO. WASH. INT’L L. REV. (forthcoming 2003) (comparing the failure of the common law in the United States to respond as does the French system to enforce government accountability and provide individual awards of damages for wrongful acts by government); Rolf Stürner, *Suing the Sovereign in Europe and Germany*, 35 GEO. WASH. INT’L L. REV. (forthcoming 2003) (discussing the availability of making claims against governments in a variety of fora rather than the concentration in a single court).

192. Meyer, *supra* note 10, at 8.

193. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) at 450-451 (Blair, J. dissenting); *supra* notes 142-56.

194. See Caminker, *supra* note 19, at 90.

individuals cannot be tolerated.¹⁹⁵ Just as we see the form of dignity claimed by nobility to be oppressive in its exclusivity, so is a dignity claimed by states to exempt themselves from accounting for their actions antithetical to the dignity of persons. Indeed, while criminal acts can be destructive of governments' role-dignity by disrupting the social order, instituting civil litigation and thus using government-created mechanisms for disputing is expressive of the role-dignity of governments—confirming governmental power by seeking an accounting of its use.

D. *Protecting Sovereignty Without Immunity from Suit*

But to require accountability does not necessitate ignoring the anxiety of governments or peoples about their status. Respect for role-dignity can be accomplished by a variety of methods. Permitting litigation to proceed does not, for example, demand that all forms of remedies be made available. Special rules—developed through statutes, treaties, and common law interpretation—can recognize competing demands upon governments that may limit their obligations to spend from their treasuries or to provide other remedies. Further, legal systems can decide that, because of the demands of a role, states or other institutional defendants can be permitted to defer their explanations of behavior.

For example, as was argued by amici in *Clinton v. Jones*,¹⁹⁶ a wise decision would have been to permit a lawsuit against then-President Clinton but to defer proceedings until after he had finished serving his term of office.¹⁹⁷ Similarly, as Justice Blair noted in *Chisholm v. Georgia*, certain forms of judgment may be offensive. In his words, a “judgment by default . . . would be too precipitate . . . and too incompatible with the dignity of the State.”¹⁹⁸ Yet another example is the congressional requirement that, when litigants challenged state statutes as violative of federal law, three judges (rather than a

195. See also THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY IN FOREIGN AFFAIRS?* (1992) (opposing more generally judicial deference to other branches of government on issues related to foreign affairs); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) (arguing that the Constitution demands such remedies).

196. 520 U.S. 681 (1997).

197. See Brief Amicus Curiae of Law Professors in Support of Petitioner, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95-1853) (Amici Professors, Akhil Reed Amar, Susan Low Block, Susan Estrich, Richard H. Fallon, Jr., Daniel A. Farber, Philip P. Frickey, Paul D. Gewirtz, John C. Jeffries, Jr., Pamela S. Karlan, Sanford Levinson, Burke Marshall, Judith Resnik, Suzanna Sherry, Steven H. Shiffrin, Kathleen M. Sullivan, Laurence H. Tribe) (arguing that a private civil action for damages, stemming from alleged conduct predating and outside the Presidency, ought to be temporarily delayed while the President served in office). See also Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701 (1995) (suggesting methods of providing temporary immunity for a President while in office).

198. 2 U.S. (2 Dall.) at 452-53.

single trial level judge) were required to decide the matter.¹⁹⁹ Reliance on the Supreme Court is another option. As Alexander Hamilton explained, “[i]n cases in which a state might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.”²⁰⁰ In short, states—as well as government officials—can make a variety of demands on courts to be responsive to the obligations of governance that require tailoring procedures to meet particular circumstances. But they ought not to be able to be fully excused from any and all forms of accountability.

This proposition holds for the marginal and aspiring state as well as the fully empowered state. Whether the Santa Clara Pueblo,²⁰¹ the State of South Carolina, or the United States, institutions have an obligation to appear (again, subject to appropriate time, place, and manner limitations) to explain their conduct. Moreover, rather than conceiving of the fact of accounting as a diminution in authority, we should understand that exchange as itself as a mark of status, that an institution has the power both to impose harm and has the global obligation to explain the lawfulness of its actions.

What about anxiety over governmental power, and specifically the concerns of states within the United States or of indigenous peoples, both seeking recognition that they hold governance powers and both fearing encroachment on their authority? It is plausible but, in our view, unpersuasive, to see states within this Union as entities vulnerable to extinction through nationalization.²⁰² Rather, despite nationalizing trends, states have a remarkable durability,²⁰³ saliency, and popularity.²⁰⁴ The relationship of states to each other, as well as to the national government, has not been static over the centuries,²⁰⁵ but states have created and maintained significant authority. (Indeed, some commentators argue that localities have a built-in utility that the nation state lacks. Given the importance of local conditions and the power of

199. See 28 U.S.C. §§ 2281-2283, which was enacted after the Supreme Court decision in *Ex parte Young*, 209 U.S. 123 (1908), and revised and limited in many respects in the 1970s. The original statute, recodified in 1948, was largely repealed in 1976. See Pub. L. No. 94-381, 90 Stat. 1119 (1976).

200. THE FEDERALIST NO. 81 (Alexander Hamilton).

201. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that an Indian tribe has sovereign immunity from a lawsuit under the Indian Civil Rights Act).

202. But see Edward Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 U.C.L.A. L. REV. 903, 944 (1994) (arguing that states were obsolete and no longer the bases for political or cultural communities).

203. This proposition holds true for many nations and ethnic communities, as well does the fluidity of certain boundaries. See generally JACOB T. LEVY, *THE MULTICLUTURALISM OF FEAR* 7-9 (2000).

204. See Richard L. Cole & John Kincaid, *Public Opinion and American Federalism: Perspectives on Taxes, Spending, and Trust*, 74 SPECTRUM: J. ST. GOV'T 14 (2001) (discussing polls supportive of state governance).

205. See Judith Resnik, *Afterword: Federalism's Options*, 14 YALE J. ON REG. 465 (1996).

global markets, it is the nation that is at risk of demise.²⁰⁶) First Nations have yet to obtain the level of protection, in texts and practices, accorded to states. But immunity is only one of many mechanisms to protect state interests, and one that has become obsolete—given the development of an appreciation of the dignity of all humans.

Our argument against immunity does not ignore the expressive interests of states and peoples in being understood as holding a distinct and important form of authority. Nor does it preclude such institutions from using the language of role-dignity when faced with focused efforts by powerful nations to impose norms and mores on groups viewed as having lesser status. Rather, we urge exploring means aside from immunity to create or to enable forms of sovereignty.

The United States is a federation concerned about preserving the authority of states. Several legal doctrines have developed to help ensure that the power of states to govern remains, despite pressures toward nationalization. One oft-cited example is the contemporary rule prohibiting Congress from “commandeering” state officials to do certain tasks.²⁰⁷ Another is the doctrine of “equal footing,” which emerged in the United States when the national government sought to impose certain conditions on territories, seeking to enter the union as states. As Eric Biber has documented in his monograph *The Price of Admission*,²⁰⁸ the United States frequently made demands of assimilation on states, as Congress sought to expand federal power and to homogenize a population. “Of the thirty-seven states admitted to the Union since the adoption of the Constitution (plus the eleven Southern states readmitted after the Civil War), almost all of them had some sort of condition imposed.”²⁰⁹ While some of those pressures were asserted to insist on the rights of African Americans,²¹⁰ others were aimed at altering practices of religion and the use of languages other than English.²¹¹

Most of those requirements did not produce litigation, but one challenge did. In 1906, Congress conditioned the admission of Oklahoma on its capital remaining at Guthrie until 1913. As this condition was debated, a Senator saw the status implications. He commented that Oklahoma was being forced to

206. GUÉHENNO, *supra* note 17, at 45-65.

207. *Printz v. United States*, 521 U.S. 898 (1997). See generally Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1997) (examining the theory and use of the anticommandeering concept).

208. Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union* (manuscript, Jan. 2003, on file with authors).

209. *Id.* at 3.

210. Nebraska's admission in 1864 provides the example. See CONG. GLOBE, 39th Cong., 2d Sess. 126 (1866); Biber, *supra* note 208, at 1-3.

211. See Biber, *supra* note 208. He discusses conditions imposed to “Americanize” inhabitants of several states—including language requirements in Louisiana (then predominantly French-speaking) and in New Mexico (where many spoke Spanish) and prohibitions in Utah on polygamy (a practice of some of that state's Mormon population).

enter "the Union with badges of dishonour and incompetency never before put upon a commonwealth."²¹² After admission, Oklahoma passed a law moving its capital from Guthrie to Oklahoma City. In *Coyle v. Smith*,²¹³ the Supreme Court held the condition unenforceable because the newly admitted state had not been placed on an "equal footing" with the other states. Given the freedom other states enjoyed to decide their capitals, Congress could not so limit Oklahoma. As the Court explained, "[t]his Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."²¹⁴ As *Coyle* illustrates, a central tenet of federalism in the United States insists that laws be applied uniformly throughout the country and no state be singled out for distinctive and disabling treatment.

The doctrine of equal footing works in the United States to create power of particular kinds for states. Some commentators argue that forms of equality across states that entail equal representation in the Senate despite population disparities harm individual rights of representation.²¹⁵ Others complain that states are insufficiently protected in Congress, thereby making Supreme Court intervention both appropriate and necessary.²¹⁶ Other federations expressly provide for nonuniform treatment of the subparts within,²¹⁷ and other federations "commandeer" their subdivisions as a method to imbue them with authority and to diminish the role of national officials.²¹⁸

Our point is not to decide which mechanism is better but rather to illustrate the variety of structural legal doctrines and practices that are available to shore up the role-dignity of governments. Whether by insisting on the sameness of subdivisions or acknowledging their differences, whether prohibiting or

212. See Peter S. Onuf, *New State Equality: The Ambiguous History of a Constitutional Principle*, 18 *PUBLIUS* 53, 53 (1988) (quoting 40 CONG. REC. 8390-91 (1906)); see also Biber, *supra* note 208, at 100.

213. 221 U.S. 559 (1911).

214. *Id.* at 567.

215. See, e.g., Akhil Reed Amar, *The Electoral College, Unfair from Day One*, N.Y. TIMES, Nov. 9, 2000, at A23.

216. See Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 *CHAPMAN L. REV.* 195 (2001); Marci A. Hamilton, *Why Federalism Must Be Enforced: A Response to Professor Kramer*, 46 *VILL. L. REV.* 1069 (2001).

217. The United Kingdom is one such example. See generally SIMON BULMER, *BRITISH DEVOLUTION AND EUROPEAN POLICY-MAKING: TRANSFORMING BRITAIN INTO MULTI-LEVEL GOVERNANCE* (2002); JOHN W. HOPKINS, *DEVOLUTION IN CONTEXT: REGION, FEDERAL & DEVOLVED GOVERNMENT IN THE MEMBER STATES OF THE EUROPEAN UNION* (2002).

218. See Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in KALYPSO NICOLAIDIS & ROBERT HOWSE, *THE FEDERAL VISION* 213 (2001) (discussing the differing approaches). Other commentary on comparative federalism can be found in Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612 (2002), and in Roderick M. Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998).

permitting commandeering of functions, and whether through laws, party politics, or other practices,²¹⁹ role-dignity of institutions can be protected without creating immunity doctrines that shield governments from responding, through formalized modes of discourse, to charges about their misbehavior.

IV. THE MIGRATION OF INTERNAL TO EXTERNAL SOVEREIGNTY

What do these developments linking the language of dignity have to do with external sovereignty and hence with international affairs and transnational norms? We began by clarifying the forms of sovereignty within U.S. parlance—internal sovereignty focused on the authority of states and tribes, and external sovereignty, focused on U.S. powers vis-à-vis countries outside our borders.

A feature, however, of sovereignty talk within the United States is the relationship between the two discourses. Once the language of dignity becomes associated with state sovereignty, it is likely to migrate to general sovereignty discussions. Return to the opening examples of dignitary claims made in 2002 by the Supreme Court's majority on behalf of state sovereign immunity. The argument was that dignity was an attribute of sovereignty itself, not of state sovereignty alone.²²⁰

Ought the United States be engaged in insisting upon an understanding of itself as a dignity holder? And what prompts a renewed focus on the dignity of states within the United States? The United States Supreme Court could expand the scope of states' immunity without relying on the claim that lawsuits are affronts to the dignity of states. But a more powerful doctrine of state sovereignty has, historically, been deployed to serve as a constraint on the scope of the international agreements made by the United States. Moreover, given the conceptual links between dignity, autonomy, and the imposition of boundaries on those interacting with the dignified person or institution, using the term dignity helps to enshrine an image of a sovereign as bounded, self-directed, and not required to engage in certain forms of relational exchanges. The reemergence of dignity as a feature of sovereignty discourse in the United States comes at a time when efforts are underway to create new transnational institutions. For us, the stress on sovereignty *within* is related to the pressures on sovereignty from *without*.

219. See Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

220. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (discussing dignity in Supreme Court immunity law). Further, were dignity to become re-embedded in United States's sovereignty law, exportation remains all too likely. The twentieth century is rich with evidence of the portability of democratic constitutional theory and law. See generally VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999). On the strengths and limits of this approach, see Vicki C. Jackson, *Gender and Transnational Legal Discourse*, 14 YALE J.L. & FEMINISM 377 (2002).

Soon after the adoption of the Universal Declaration on Human Rights, isolationists within the United States turned to state sovereignty as a reason why the United States could not participate in a variety of international accords. Senator John Bricker proposed a constitutional amendment to limit federal treaty power.²²¹ According to one commentator, Bricker wanted to ensure that international agreements would not lead to interference by the United Nations in domestic affairs, nor to social and economic policies more liberal than those in the United States, nor serve to undermine the authority of states over such issues.²²² Indeed, throughout the twentieth century, state sovereignty has been used as a defense against laws generated in cooperation with other countries.²²³

The terms under which the United States ascribed to some international conventions are illustrative of the effects of internal sovereignty on external sovereignty. Many countries agree to join various conventions but with caveats, termed reservations, understandings, and declarations (RUDs).²²⁴ The United States has often added RUDs that invoke federalism as a limiting premise, invoking internal commitment to state rights to preclude certain forms of international commitments.²²⁵ Thus, by shoring up state identity through reliance and expansion of the concept of states as bearers of dignity, isolationists gain another basis upon which to argue against various transnational efforts, such as joining in the International Criminal Court or in conventions committed to equality, such as CEDAW.

A recent example of such a claim of intrusion on sovereignty comes from a Heritage Foundation Report objecting to participation by the United States in

221. S.J. Res. 130, 82d Cong., 98 CONG. REC. 908 (1952) (“[N]o treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this Constitution . . .”).

222. See DUANE TANNEBAUM, *THE BRICKER AMENDMENT CONTROVERSY* (1988) (examining the political history of the proposal and its effects).

223. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 345-46 (1995) (discussing the addition by the United States of a “federalism clause” to agreements that it joins on international human rights); see also Resnik, *Categorical Federalism*, *supra* note 24, at 666-68 (discussing the relationship between opposition to international conventions on women’s rights and the development of federalism law in the United States).

224. See generally Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000); Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT’L L. & ECON. 49, 55 (1997); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003).

225. See, e.g., *Convention on the Elimination of All Forms of Discrimination Against Women: Hearing Before the Senate Committee on Foreign Relations*, 103d Cong. 13 (1994) (statement of Jamison S. Borek, Deputy Legal Adviser, Department of State). See generally Susan Bandes, *Treaties, Sovereign Immunity, and the “Plan of the Convention,”* 42 VA. J. INT’L L. 743 (2002); Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 560, 574-75 (1997).

human rights treaties of the United Nations.²²⁶ That report, *How the U.N. Conventions on Women's and Children's Rights Undermine Family, Religion, and Sovereignty*, argued that conventions such as CEDAW promote a "radical restructuring of society" at odds with American values.²²⁷ Readers learn that the United Nations has come under the domination of a "powerful feminist-socialist alliance that has worked deliberately" to undermine family values.²²⁸ The report called on Congress to rebuff the attack on the nation's sovereignty by refusing to give commitments and resources to various programs and conventions of the United Nations.²²⁹

This stress on autonomous sovereignty is, however, painfully at odds with the demands of twenty-first century governance. What the twentieth century accomplished is a new understanding of the dignity of individuals and of groups, as well as a revised vision of the appropriate scope of the sovereignty of governments. Being accountable is as central a tenet of legitimate governments as dignity is for persons. Holding countries to the requirements of the rule of law is a key facet of constitutional governance, committed to placing boundaries on the power of the state. As today's political theorists debate the plausibility of the nation state itself²³⁰ and the viability of the concept of national citizenship,²³¹ the focus of a great nation's politics ought to be on how to shift the practices and laws of the nation state such that it can secure the safety and freedom of people within and without its borders and share in the cooperative relational process of responding to a globalized economy.

V. REAPPRAISING ROLE-DIGNITY

The invocation of dignity in relationship to sovereignty proves helpful in identifying the import of efforts to enhance state sovereignty. Because over the past two centuries, dignity has gained legal recognition as an attribute not only of monarchs and entities but also of all persons, discussions of dignity enrich an understanding of the depth and nature of an injury, marking a diminution in status atop other harms inflicted. Precisely because of the aura of insult, speaking of dignity is especially useful for persons or peoples whose status and political authority is in question.

The context of an assertion of dignity for institutions is thus central to our analysis. A contextual inquiry into the utility of role-dignity as an attribute of

226. See Patrick F. Fagan, *How U.N. Conventions on Women's and Children's Rights Undermine Family, Religion, and Sovereignty* (Heritage Found., The Heritage Foundation Backgrounder No. 1407, 2001).

227. *Id.* at 21.

228. *Id.*

229. *Id.*

230. See, e.g., GUÉHENNO, *supra* note 17.

231. See Aleinikoff, *supra* note 62; Bosniak, *supra* note 62; Spiro, *Impossibility of Citizenship*, *supra* note 62.

nation states suggests that, while marginal peoples may seek to invoke it in response to their need for status, powerful nations ought to be leery of generating a discourse of dignity. This analysis must also be dynamic, for the power of nations and of peoples change over time. In the eighteenth and nineteenth centuries, the United States may have appropriately turned to role-dignity to stake its place on the world stage. Its own government structures—from the House of Representatives to courts to states—were in need of recognition as authoritative institutions.

Further, both marginal and powerful nations can suffer injuries to their ability to govern and to secure safety for those within their territories. This sense of injury is currently particularly acute in the United States, which unlike many other countries, has only recently experienced a terrorist attack on its people on its own territory.²³² But to infuse the harms with an additional concept of a status insult—captured by the term dignity—is neither needed nor helpful for powerful governments. Such nations already have role-dignity in the eyes of the world. While they may be fearful of intrusion, understanding such aggression as an injury to status in addition to a material injury is a mechanism for stirring passionate opposition to perceived threats.

The United States is seen by some as the sole superpower and admitted by all to be an astonishingly powerful member of the world community. The United States currently serves as an example of a powerful nation with too little understanding of the need for cooperative, transnational work.²³³ Shoring up its own sense of autonomy and authority through the rhetoric of dignity makes less likely its willingness to engage in relational interactions in which it self-consciously does not exercise all the potential power it has.

And for all states, powerful or marginal, being called to account is not an indignity. Given twentieth century understandings of the dignity of persons and of the dialogic obligations of states, no institution ought to be able to object to having to make arguments (at some time and in appropriate places) about

232. The anxiety can be found in many commentaries and in court decisions, written after September 11. One example is a ruling on closing court proceedings. A panel in one circuit held that a blanket closing of deportation hearings violated the First Amendment principle of open democracy. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 686 (6th Cir. 2002). In another circuit, a majority on a panel upheld the closing by explaining that September 11th's "unprecedented mass-slaughter of American citizens on American soil inevitably forced the government to take security measures that infringed on some rights and privileges. But these do not themselves represent real threats to democracy. A real threat could arise, however, should the government fail in its mission to prevent another September 11th." See *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 220-21 (3d Cir. 2002).

233. As a result, the United States has the power and ability to shape the terms of certain international treaties, even while refusing to sign or participate in them. An example is the United States's refusal to ratify the Rome Statute establishing the International Criminal Court, while being able to obtain an agreement from the European Union countries to exempt American soldiers and government officials from prosecution in the new court once it is established. See Paul Meller, *Europeans to Exempt U.S. from War Court*, N.Y. TIMES, Oct. 1, 2002, at A6.

whether or not it has violated rights, whether arising from federal law (as in the U.S. context) or international law. The role-dignity claims of institutions have become limited by virtue of the ascendancy of human dignity. Given that democratic governmental action has become synonymous with accountable dialogical action, requiring governments to participate in litigation ought to be understood as enhancing, rather than diminishing, the role-dignity appropriate to sovereignty.